

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ZELLA MAYE FREEMAN,)	1:05-cv-0328 OWW SMS
)	
Plaintiff,)	MEMORANDUM DECISION AND
)	ORDER GRANTING/DENYING
v.)	DEFENDANTS' MOTION FOR
)	SUMMARY JUDGMENT
CITY OF FRESNO, R. GARRISON)	
(F.P.D. Badge No. 780), MARK A.)	
YEE (F.P.D. Badge No. 692), J.)	
CAPRIOLA (F.S.O. Badge No.)	
7622), I. BARRIMOND (F.S.O.)	
Badge No. 1153), J. HOLLINS)	
(F.S.O. Badge No. 2346), R.)	
PEREZ (F.S.O. Badge No. 6169),)	
A. SIMONSON (F.S.O. Badge No.)	
9364), inclusive,)	
)	
Defendants.)	
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)	

I. INTRODUCTION

Plaintiff Zella Maye Freeman ("Freeman" or "Plaintiff") filed a complaint against Defendants for their alleged unreasonable search and seizure of her home in violation of her federal civil rights, as well as various state laws. (Doc. 1, Complaint, Filed March 8, 2005.) This action comes before the court on Defendants' motion for summary judgment of Freeman's claims. (Doc. 61-2, Motion for Summary Judgment, Filed July 31,

2006.) Freeman opposes the motion. (Doc. 89, Pl.'s Amended Opp., Filed October 4, 2006.)

II. PROCEDURAL BACKGROUND

Freeman filed her initial complaint on March 8, 2005. (Doc. 1, Complaint.) On June 28, 2005 Freeman amended her complaint. (Doc. 24, First Amended Complaint.) On July 31, 2006 Defendants filed a motion for summary judgment. (Doc. 61-2, Motion for Summary Judgment.) Freeman opposed the motion on October 2, 2006. (Doc. 81, Pl.'s Opp. to Mot. for Summary Judgment.) Freeman then filed an amended opposition on October 4, 2006. (Doc. 89, Pl.'s Amended Opp.) Defendants filed their reply on October 16, 2006. (Doc. 96, Def's Reply.)

III. FACTUAL BACKGROUND

A. UNDISPUTED FACTS

1. Facts Relevant to Obtaining the Search Warrant

During his assignment with the Multi Agency Gang Enforcement Consortium ("M.A.G.E.C."), Detective Mark Yee along with several other investigators, became involved in a one and a half year investigation of criminal activities including gang-related shootings, homicides and attempted homicides committed by rival African American gangs in the southwest Fresno area. (DSUF, No. 2) Specifically, the investigation focused on validated criminal street gangs the "West Side Strother Boys", its gang leader Darryl "Dedo" Hilliard, and their rival, "the Garrett Street Gang." (DSUF, No. 3)

In February 2004, Detective Yee authored a thirty one page search warrant affidavit, arising out of the investigation stemming from the gang related shootings by the subject gangs.

1 (DSUF, No. 5) The Search Warrant Affidavit was signed by
2 Detective Yee under penalty of perjury. (DSUF, No. 7) At that
3 time, the West Side Strother Boys was still an active gang
4 committing violent crimes and there were investigations
5 outstanding. (DSUF, 8) The Affidavit provided specific details
6 of incidents during that investigation.

7 2. Detective Yee's Investigation

8 i. History of Yee's One and a Half Year Investigation
9 in Support of Probable Cause

10 It is undisputed that the record contains an extensive
11 account of various incidents of violence between the Strother
12 Boys and the Garret Street gang. These incidents were described
13 in Yee's twenty four page statement of probable cause in support
14 of the Search Warrant. Yee's affidavit provided specific details
15 of incidents that included the following¹:

- 16 1. shots fired at Strother Boys Gang on November 19, 2002,
- 17 2. shots fired at Garret Street Gang on November 20, 2002,
- 18 3. the shooting of a six year old boy shot in the crossfire
19 between Srother Boys and Garret Street gangs on December 26,
20 2002.
- 21 4. Strother Boy Darryl Hilliard's Fingerprints on a firearm at
22 a disturbance on March 5, 2003,
- 23 5. Shootout between Darryl Hilliard and Garret Street Boys on
24 March 11, 2003, and
- 25 6. Garret Street Gang member shot on January 29, 2004.

26
27 ¹ For an exhaustive list of the incidents and the details of
28 each incident see Doc. 61, Def.'s Motion for Summary Judgment,
Filed July 31, 2006, pp. 5-16.

1 ii. Detective Yee's Conclusions of the Investigation

2 Detective Yee, who has been an officer with the Fresno
3 Police Department since 1994, was assigned to the M.A.G.E.C. Unit
4 in 1997. (DSUF, No. 236)

5 In addition to the information described above, along with
6 confidential information² contained in a sealed portion of the
7 affidavit, Detective Yee relied on the following in seeking
8 authorization to search the ten residences:

- 9 1. There was a long-standing and ongoing feud between
10 members of the "West Side Strother Boys" and "The
11 Garrett Street Boys" and that feud involved many
12 acts of violence on both sides. (DSUF, No. 42)
- 13 2. Detective Yee knew that the Strother Boys were a
14 close knit group, and that it was not uncommon for
15 many of the members to be involved in related acts
16 of violence. (DSUF, No. 43)
- 17 3. When an ongoing feud involving many separate
18 members of the same gang exists, it is not
19 uncommon for the violent members at the central
20 core of the gang to associate with each other, and
21 to plan together aggressive acts and/or acts of
22 violent retaliation to be perpetrated by a few
23 members of this violent central cadre. (DSUF, No.
24 44)
- 25 4. The pattern of violent acts perpetrated by "The
26 West Side Strother Boys" and the large number of
27 people involved in these acts, made it more likely
28 than not that there was a general common plan
existing among the gang to commit acts of violence

22 ² It is undisputed that Detective Yee requested the
23 confidential portion of the affidavit be sealed under *People v.*
24 *Hobbs*, 7 Cal. 4th 948 (1994) in order to protect the safety and
25 welfare of the confidential informant(s). (DSUF, No. 54.) It is
26 also undisputed that, according to Freeman's police practices
27 expert, Roger Clark, requesting to seal a portion of an affidavit
28 should be done very carefully, so as to protect the confidential
sources, because people can die if such information is disclosed.
(DSUF, No. 55.) It was Detective Yee's practice never to break
this promise. (*Id.*)

1 against persons they believed to belong to or to
2 associate with their rivals. (DSUF, No. 45)

3 5. In a long-standing gang shooting feud, members of
4 the victim's gang in one shooting frequently know
5 or suspect that they know who the perpetrators
6 are. This is because of the "word on the street",
7 which is information passed from person to person,
8 often based on sources within the perpetrator's
9 gang; on eyewitnesses reluctant to cooperate with
10 the police; or on gang graffiti, composed of
11 writings on buildings or walls, which is a means
12 used by some gang members to take credit for a
13 violent incident. (DSUF, No. 46)

14 6. Because of the above, a person involved as a
15 shooter in a gang-related feud incident will
16 generally assume his identity is known on the
17 streets. (DSUF, No. 47) While he must
18 temporarily dispose of the weapon used in the
19 underlying offense, he must at the same time have
20 accessible to himself a weapon which can be used
21 for self-defense upon short notice. (*Id.*)

22 7. That gang members who are involved in an ongoing
23 feud of shooting incidents frequently do not
24 permanently dispose of their weapons, preferring
25 to retain access to them for protection from
26 retaliation or for further use in acts of
27 aggression while the feud is continuing. (DSUF,
28 No. 48)

1 8. Gang members who use a firearm in gang feud
2 situations frequently borrow the weapon used from
3 a fellow gang member, and after the commission of
4 a violent act with the weapon, they return it to
5 the gang member they borrowed it from, to prevent
6 it being seized by law enforcement officers during
7 a search conducted shortly after the commission of
8 the crime. (DSUF, No. 49)

9 9. Gang members who do use their own firearms in gang
10 war situations frequently pass the weapons used to
11 fellow gang members for safe keeping, in order to
12 avoid the weapon being seized by law enforcement
13 officers during a search of their residence,
14 vehicle or person. (DSUF, No. 50)

15 10. When a gang member in the above situation believes
16 that he is no longer liable to be searched as a
17 suspect in the shooting incident, he will
18 frequently retrieve the weapon used and store it
19 where it would be readily accessible for defense
20 or offense, such as in his residence, on his
21 person or in a vehicle to which he has access.

(DSUF, No. 51)

iii. Facts Regarding Detective Yee's Request for a
Search Warrant

It is undisputed that the ten residences were listed and described with particularity in Attachment "A" to the Search Warrant Affidavit. (DSUF, No. 58) The items to be seized included evidence of gang membership, firearms and ammunition, and were listed in Attachment "B" to the Search Warrant Affidavit. (DSUF, No. 59) Detective Yee had probable cause to believe, and did believe, that the property described in Attachment "B" to the Affidavit was lawfully seizable pursuant to California Penal Code Section 1524. (DSUF, No. 60)

It is also undisputed that on or about February 17, 2004, Detective Yee took the Search Warrant Affidavit and Confidential Attachment to the Honorable Judge Franklin P. Jones' chambers in the Fresno County Superior Court. (DSUF, No. 63) Detective Yee believed that Judge Jones was a detached and neutral magistrate at the time he presented the Search Warrant Affidavit to him. (DSUF, No. 64) Freeman does not dispute that Judge Jones signed the Search Warrant after thorough review on February 17, 2004 and authorized the search of the ten residences. (DSUF, No. 69) Judge Jones ordered the confidential portion of the Affidavit to be sealed, which was kept in the custody of the Fresno County Superior Court. (DSUF, No. 70)

iv. Judge Jones Reliance on Detective Yee's Training
and Experience

Defendants argue that Detective Yee described in detail his professional experience, his experience with street gangs, his

1 assignments, and his duties and training with the Fresno Police
2 Department. It is undisputed that Detective Yee had extensive
3 training and experience, which included the following:

- 4 1. Identification and validation of gangs and gang
5 members
- 6 2. The investigation of gang-related shootings,
7 homicides and other violent gang crimes leading to
8 the arrests and the conviction of numerous violent
9 gang offenders and the recovery of narcotic
10 paraphernalia, controlled substances and/or stolen
11 property
- 12 3. Gathering of gang intelligence information; the
13 maintenance of gang files/information shared with
14 detectives from other local law enforcement
15 agencies, other departments in the State of
16 California and other states across the nation
- 17 4. He has received ongoing advanced officer training
18 courses on the preparation and service of search
19 warrants
- 20 5. Cultural awareness, use of force, informant
21 development
- 22 6. Interview and interrogation and various other
23 classes and seminars.

24 (DSUF, No. 71)

25 It is also undisputed that in his assignment with
26 M.A.G.E.C., Detective Yee had become acquainted with numerous
27 gang members and associates through investigations, arrests,
28 field interviews, vehicle stops, subject checks, consensual
contacts and informants. (DSUF, No. 72) Detective Yee is
familiar with street gang habits, mannerisms, and techniques used
in committing violent offenses and gang members' behaviors in
attempting to conceal evidence of such occurrences from detection
by both the general public and law enforcement. (DSUF, No. 73)
At the time of preparing this Search Warrant Detective Yee had
been specializing in Black gangs and investigating gang-related

1 shootings, homicides, and other violent gang crimes for six
2 years. (DSUF, No. 74) Detective Yee has also taught Black Gang
3 Awareness Training Seminars in Fresno County and conducted gang
4 presentations to numerous civic groups. (DSUF, No. 75)

5 Freeman does not dispute that Detective Yee participated in
6 numerous parole/probation searches of residences of known,
7 validated criminal street gang members/associates where gang
8 paraphernalia was located. (DSUF, No. 76) He was a member of
9 the California Gang Investigator's Association, Northern
10 California Gang Investigator's Association, California Homicide
11 Investigator's Association, and California Narcotics Officer's
12 Association. (DSUF, No. 77)

13 Detective Yee received some of this training through his
14 department agency while serving on the M.A.G.E.C.³ team. (DSUF,
15 No. 78) Most of the named suspects included in Detective Yee's
16 Affidavit, were validated gang members or associates. (DSUF, No.
17 82) Detective Yee has qualified and testified as an expert on
18 Black gangs in the California Superior Court and Federal Court.
19 (DSUF, No. 83) It is his expert opinion that it is common for
20 girlfriends and parents to aid and abet their boyfriend or child
21

22 ³ Freeman does not dispute that M.A.G.E.C.'s mission is to
23 eradicate criminal activity of street gangs whose members
24 threaten, terrorize, and commit a multitude of crimes against the
25 peaceful citizens of their neighborhoods, schools and businesses.
26 (DSUF, No. 79) M.A.G.E.C. utilizes the California State Office
27 of Criminal Justice 10-point criteria to validate gang members
28 and associates. (DSUF, No. 80) Three or more of the ten points
can validate the subject as an active gang member. Two of the
ten points can validate the subject as an associate of the gang.
(DSUF, No. 81)

1 who are known criminals by hiding, concealing and disposing of
2 any type of evidence that might contribute to their prosecution.
3 (DSUF, No. 84)

4 v. Facts Relating to Freeman's Residence and Its
5 Proximity to Gang Activity

6 Defendants state that Freeman's residence is situated in a
7 lower economic neighborhood that is well known for criminal gang
8 activity and violence. (DSUF, No. 85) It is undisputed that
9 Freeman's home is located in the heart of where most of the gang-
10 related shootings occurred. (DSUF, No. 86)

11 On January 22, 2004, Darryl Hilliard was under surveillance
12 by law enforcement officers, including Detective Yee. (DSUF, No.
13 89) It is undisputed that as of January 22, 2004 a green 2003
14 Pontiac Grand Am was parked in Freeman's driveway and that a
15 records check confirmed this vehicle was registered to her.
16 (DSUF, No. 92) It is also undisputed that Hilliard's mother
17 dropped off Hilliard at Freeman's residence, and then drove away
18 without him. (DSUF, No. 93)

19 Freeman also does not dispute that later that same day,
20 after a court appearance at the Fresno County Courthouse,
21 Hilliard was observed getting into Freeman's Pontiac Grand Am.
22 (DSUF, No. 95) It is undisputed that on the way to Hilliard's
23 mother's house, located at 4430 N. Sequoia Avenue in Fresno, Ms.
24 Dillingham was observed driving at high speeds and making quick
25 turning movements as Hilliard leaned down in the front passenger
26 seat as if to conceal himself. (DSUF, No. 97) This behavior was
27 consistent with counter-surveillance techniques. (DSUF, No. 98)

28 Surveillance of Hilliard continued on February 2, 2004.

1 (DSUF, No. 99) After taking him to court, Ms. Dillingham drove
2 Hilliard back to his mother's house. (DSUF, No. 101) Shortly
3 thereafter, Hilliard was observed driving Freeman's vehicle to
4 various locations where he made contact with various other
5 Strother Boys gang affiliates. (DSUF, No. 105) Hilliard's
6 behavior while driving around in Plaintiff's vehicle was
7 consistent with that of a person dealing drugs. (DSUF, No. 106)
8 Freeman also does not dispute that due to the lack of resources
9 and manpower amongst law enforcement, it was not feasible to
10 monitor every move Darryl Hilliard made. (DSUF, No. 108)

11 It is common practice for gang members to keep their
12 weaponry, stolen property and other evidence of their crime
13 involvement at their homes or "safe houses". (DSUF, No. 109) It
14 is undisputed that, in an attempt to evade detection by the
15 police, gang members will routinely move the property among
16 associates/members/girlfriends within their own specific gang.
17 (DSUF, No. 110) Detective Yee was looking for ballistic evidence
18 that would tie Darryl Hilliard to some of the crimes he was a
19 prime suspect in, i.e. drive by shootings, shooting into homes,
20 shooting into cars, and shooting people. (DSUF, No. 111)

21 Freeman's primary physician testified that she currently has
22 stress as a result of her granddaughter living with her. (DSUF,
23 No. 244) Freeman does not dispute that her home had been shot at
24 while she was in her living room causing bullet hole damage to
25 her house before this incident. (DSUF, No. 245) Further,
26 Freeman's neighbor across the street was almost shot when her
27 home was hit with gunfire. [Anthony Lyday testified that while
28 his mother was cooking at the stove in her kitchen, Anthony heard

1 gun fire so he grabbed his mother and threw her to the ground.
2 Immediately thereafter, bullets came through her kitchen where
3 she was standing. There have been a couple of these incidents
4 where he has had to save his mom.] (DSUF, No. 247)
5

6 B. Facts Relevant to the Service of the Search Warrant

7 1. The Search Warrant Briefing

8 On the morning of February 19, 2004⁴, all officers who were
9 to participate in serving the Search Warrant, met at the
10 M.A.G.E.C. headquarters for a briefing before the search. (DSUF,
11 No. 114) Detective Mark Yee was assigned to the Metro
12 Investigations Team, which was to serve the Warrant at four
13 locations, none of which are a subject of this lawsuit. (DSUF,
14 No. 115)

15 The Rural Tactical Team is a uniform team focused primarily
16 on the tactical operation of eradicating criminal activity within
17 the rural County of Fresno. (DSUF, No. 116) Members of this
18 team consisted primarily of Fresno County Sheriff Deputies, who
19 included: Defendants Ian Barrimond, John Capriola, Jason Hollins,
20 Robert Perez, and Andrew Simonson; as well as Fresno Police
21 Officer Robert Garrison. (*Id.*) It also included non-defendant
22 Officers Andrew Camerana and Michael Higgins. This team was
23 assigned to search two homes. (*Id.*)

24 During the briefing, Detective Yee provided all the officers
25 with the following:
26

27 ⁴ It is undisputed that February 19, 2004 was a clear,
28 bright, and sunny day. (DSUF, No. 113)

1. a background of his investigations
2. a history of the ongoing gang-related shootings
3. the nature of the Search Warrant and information regarding suspect Darryl Hilliard
4. a photograph of Darryl Hilliard
5. the locations to be searched
6. copies of the list of items authorized to be searched for and seized
7. and a copy of the Notice of Search Warrant that each team was to serve on the occupants of the residences

(DSUF, No. 117) Specifically, Detective Yee cautioned the officers that they were serving a "high risk" Search Warrant and to expect for Darryl Hilliard or his fellow gang members and/or associates, to be at any of the locations. He also cautioned that it was very likely that such individuals would be armed.

(DSUF, No. 118)

Sergeant Barrimond had assigned Fresno Police Officer Robert Garrison to be the Case Agent for their team, whose responsibilities included: giving the knock and notice, collecting and documenting all the evidence and property seized, preparing the report, and booking the evidence into the Fresno Police Department ("FPD") property room. (DSUF, No. 119)

Sergeant Barrimond chose Officer Garrison because he was the only Fresno Police Officer on the team and since the Case Agent for the entire operation was Detective Yee, a Fresno Police Officer, it would make the processing, documentation and booking of

1 evidence easier to have a Fresno Police Officer act as Case
2 Agent. (DSUF, No. 120)

3 After the briefing, Officer Garrison contacted the FPD
4 Records Department by telephone and spoke with a Records' Clerk
5 who informed him that there had been several prior calls for
6 service at Plaintiff's residence, which included prior
7 disturbances and prior warrant service attempts. (DSUF, No. 121)

8 The Rural Tactical Team then proceeded to the Chandler
9 Airport, a neutral location near the Plaintiff's residence, to
10 conduct a second briefing. At this location, the officers
11 checked their equipment, ammunition, and gear to ensure
12 everything was properly functional. Each officer was in full law
13 enforcement tactical gear wearing bullet proof vests that bore
14 the name, M.A.G.E.C. on the back. Each of their uniforms were
15 clearly marked with their respective law enforcement agency
16 insignia or patch. (DSUF, No. 122)

17 Sergeant Barrimond gave the officers position assignments
18 and assigned Deputies Perez and Simonson to the perimeter of the
19 residence. (DSUF, No. 123) Officers Garrison, Camerana and
20 Higgins, and Deputies Capriola and Hollins, were all assigned to
21 the Entry Team. (DSUF, No. 124) Due to the variety of risks
22 involved in serving this Search Warrant, Sergeant Barrimond
23 ensured that all the officers were mentally prepared and asked
24 them, "are you all here?". (DSUF, No. 125) He wanted to make
25 sure they were focused and did not have their minds on extraneous
26 matters. (*Id.*)

27 Defendants Barrimond, Capriola, Hollins, Perez, Simonson and
28 Garrison, were of the understanding that they were going to

1 search Plaintiff's residence pursuant to a valid search warrant
2 signed by a judge and had no reason to believe the Search Warrant
3 was unlawful or invalid in any respect. (DSUF, No. 157)

4 2. Search of Freeman's Residence

5 All the officers who participated in the service of this
6 Search Warrant understood that this was a "high risk" warrant due
7 to the nature of the underlying crimes being committed by the
8 suspect Darryl Hilliard that included homicide, gang-related
9 shootings, and other criminal activity. (DSUF, No. 221) All the
10 officers understood Hilliard was a validated gang member whose
11 fellow gang members, associates and affiliates were also very
12 dangerous. (DSUF, No. 222) Freeman does not dispute that the
13 officers also understood they were searching for firearms,
14 ammunition, gang indicia and other evidence of criminal activity.
15 (DSUF, No. 223)

16 While approaching the front of the house, Deputies Perez and
17 Simonson branched out of the line to take a position near the
18 driveway, perimeter area. (DSUF, No. 126) The lead Officer was
19 Garrison who was followed by Officer Higgins who was then
20 followed by Deputy Capriola. (DSUF, No. 127)

21 Plaintiff's front door is on a two step elevation from the
22 ground. The house has barred windows on each side of the front
23 door. (DSUF, No. 128) Officer Garrison did not stand in front
24 of the door but positioned himself directly under the right front
25 window on the ground level. (DSUF, No. 130) Officer Garrison
26 had his department issued handgun in his right hand, and used his
27 left hand to bang on the security door. (DSUF, No. 131) He
28 checked and confirmed the security door was locked. (DSUF, No.

1 133)

2 Plaintiff, who was inside the residence, did not immediately
3 open the door and the Officers on the "stick" (line-up of
4 officers on the entry team going through the door) were growing
5 concerned that the team was taking too long to make entry. After
6 a lengthy period of time, the interior door finally opened.

7 (DSUF, No. 134) Plaintiff, responded, "what do you want?"

8 (DSUF, No. 136) Officer Garrison continued to tell Plaintiff to
9 open the door. (DSUF, No. 137) Plaintiff finally unlocked the

10 security door at which point Officer Garrison grabbed the door

11 handle and pulled the door open. (DSUF, No. 138) Officer

12 Garrison stepped onto the front step and made entry into the

13 home, he was telling Plaintiff to get down on the floor. (DSUF,

14 No. 139) Plaintiff was verbally abusive to Officer Garrison as

15 well as the Paramedics who arrived on scene. (DSUF, No. 243)

16 It is undisputed that Detective Yee did not participate in
17 serving the Search Warrant at Plaintiff's residence and was never
18 present at any time during the search of her residence. (DSUF,

19 No. 112) Two of Plaintiff's neighbors who were positioned across

20 the street and witnessed the entry, testified in deposition that

21 they could hear the officers shouting for Plaintiff to open the

22 door for several minutes. (DSUF, No. 217) Specifically, Anthony

23 Lyday estimated that it took two to three minutes before the

24 officers made entry. (DSUF, No. 218) Gwen Echoles and Anthony

25 Lyday both heard the officers shout and announce their presence

26 while pounding on the front metal security door of Plaintiff's

27 residence. (DSUF, No. 219) Neither Gwen Echoles or Anthony

28 Lyday heard the officers ever threaten to shoot Plaintiff.

1 (DSUF, No. 220) During the search, Officer Garrison seized a
2 loaded six shot revolver that was located in the bedroom. (DSUF,
3 No. 226)

4 3. Officer Garrison's Use of Force

5 Officer Garrison has been with the Fresno Police Department
6 since 1996 and was assigned to the M.A.G.E.C. Unit in 2003.

7 (DSUF, No. 237) Officer Garrison immediately entered the
8 residence but was not able to clearly see inside due to a brief
9 eye adjustment caused by coming in from outside where it was
10 bright and sunny, into a small, dimly lit room. (DSUF, No. 140)
11 Deputy Capriola also saw that it was very dark and he could not
12 see much inside the residence. (DSUF, No. 141) Officer Garrison
13 felt his foot brush against an object on the floor then saw a
14 form in front of him. He yelled, "Police Department, get on the
15 ground, get on the ground." (DSUF, No. 142)

16 There was no cover or concealment for any of the officers
17 who were in that doorway. (DSUF, No. 146) Deputy Garrison
18 immediately thought, "this isn't good" because the officers were
19 not entering as fast as they should have. (DSUF, No. 147)

20 The doorway is known as the "funnel of death". This is due
21 to the high likelihood of officers being injured or killed in the
22 doorway because of the backlighting. Therefore it is necessary
23 to get through the doorway as quickly and safely as possible.
24 This ensures the safety of the officers and the subjects of the
25 residence. (DSUF, No. 148)

26 Given the amount of time between Officer Garrison entering
27 the residence, feeling this perceived threat to his gun arm,
28 combined with his inability to see clearly, and his men directly

1 behind him moving quickly, he did not have sufficient time to
2 evaluate the age and characteristics of this individual. (DSUF,
3 No. 150) Ordinarily, an entry would be very rapid, and although
4 the momentum of the officers on this team was originally quick,
5 the entry was much slower due Officer Garrison's encounter with
6 Plaintiff. (DSUF, No. 153)

7 After the home was secured, Officer Garrison returned to the
8 living room area, which was the first time he realized Plaintiff
9 was an elderly female. (DSUF, No. 154) Officer Garrison
10 inquired as to whether Plaintiff was okay and offered to call her
11 an ambulance, but she refused. (DSUF, No. 155)

12 He asked her for her name, but she was uncooperative and
13 verbally abusive towards him. Officer Garrison did not want to
14 aggravate the tension Plaintiff was already exhibiting, so, he
15 limited his contact with her. (DSUF, No. 156) Officer Garrison
16 as well as all the officers on this team deny that Officer
17 Garrison ever threatened to shoot Plaintiff. (DSUF, No. 216)

18 4. Deputy Perez

19 Deputy Perez remained outside of the residence securing the
20 perimeter where he remained throughout the entire duration of the
21 search. (DSUF, No. 159) Deputy Perez looked for threats and/or
22 suspects who may have tried to flee the area. (DSUF, No. 160)
23 At no time during the duration of the search did Deputy Perez
24 ever enter Plaintiff's residence. (DSUF, No. 161) At no time
25 during the search did Deputy Perez ever make any contact,
26 physical or verbal, with the Plaintiff. (DSUF, No. 162)

27 5. Deputy Simonson

28 Deputy Simonson remained outside of the residence securing

1 the perimeter until the entry team was done securing the interior
2 of the residence. (DSUF, No. 163) Deputy Simonson then went
3 inside the residence to assist in documenting evidence seized on
4 an inventory log. (DSUF, No. 164) At no time while inside the
5 residence did Deputy Simonson ever make any physical or verbal
6 contact with the Plaintiff. (DSUF, No. 165) He was not present
7 during the initial entry and did not observe the physical contact
8 between Plaintiff and Officer Garrison. (DSUF, No. 166)

9 6. Deputy Capriola

10 Deputy Capriola was the third officer who entered
11 Plaintiff's residence, behind Officer Higgins, who was behind
12 Officer Garrison. (DSUF, No. 167) Usually, the entry into a
13 residence is very rapid, however, on this particular day, it was
14 slower. (DSUF, No. 168) Deputy Capriola's immediate thought
15 was, "this isn't good...this is going too slow" because the
16 officers were not entering into the house as fast they should
17 have. (DSUF, No. 169)

18 Deputy Capriola looked beyond the physical contact into the
19 dark living room and beyond Officer Garrison to see if there were
20 any other threats ahead. (DSUF, No. 172) Deputy Capriola was
21 very concerned because Officer Garrison got hung up just inside
22 the doorway, causing Officer Higgins to stall in the door frame,
23 thereby causing Deputy Capriola to stall just outside the
24 doorway. (DSUF, No. 173) In this position, there was no cover
25 or concealment for any of the officers who were in that doorway.
26 (DSUF, No. 174)

27 Once inside the door, Deputy Capriola observed Plaintiff
28 laying partially on the ground and halfway on a chair that was

1 situated a foot or two on the right, inside the door. (DSUF, No.
2 175) Plaintiff's legs were sticking out partially in the doorway
3 but Deputy Capriola did not see how it was she landed in that
4 position. (DSUF, No. 176) Deputy Capriola stepped over
5 Plaintiff's feet and went left into the kitchen to secure that
6 area. (DSUF, No. 177) After the house was determined to be
7 secured, he walked over to the Plaintiff and assisted Sergeant
8 Barrimond in helping Plaintiff to a couch. (DSUF, No. 178)
9 Deputy Capriola had no further contact or communication with
10 Plaintiff. (DSUF, No. 179)

11 7. Deputy Hollins

12 Deputy Hollins was one of the last officers to enter
13 Plaintiff's residence because he was assigned to the breaching
14 device that is used to force entry when necessary. (DSUF, No.
15 180) The breaching device requires two hands to carry so he did
16 not have a firearm in hand. (DSUF, No. 181) The knock and
17 notice took much longer than any other search warrant he had ever
18 been on. (DSUF, No. 182) Deputy Hollins, who stands six feet,
19 four inches tall, was able to see over the officers in front of
20 him. (DSUF, No. 183)

21 As the officer made their way into the residence, Deputy
22 Hollins caught a glimpse of Plaintiff falling near a chair that
23 was by the front door. (DSUF, No. 184) Deputy Hollins did not
24 see how she fell or what caused her to fall. (DSUF, No. 185)

25 After securing the residence but prior to conducting the
26 search, Deputy Hollins photographed the residence. He also
27 photographed the items and locations from where they were seized.
28 (DSUF, No. 186) He had no physical or verbal contact with the

1 Plaintiff the entire duration of the search. (DSUF, No. 187)

2 8. Sergeant Barrimond

3 Sergeant Barrimond was the supervisor for the Rural Tactical
4 Team. (DSUF, No. 188) Sergeant Barrimond's responsibilities as
5 Supervisor were to make the assignments and to ensure that his
6 team executed the search warrant in a lawful, efficient and safe
7 manner. (DSUF, No. 189) Prior to embarking to the Plaintiff's
8 residence, Sergeant Barrimond obtained, reviewed and familiarized
9 himself with a copy of the entire Search Warrant Affidavit and
10 attachments because he wanted to be comfortable with it since his
11 team did not write the Search Warrant. (DSUF, No. 190)

12 When the team arrived to Plaintiff's residence, Sergeant
13 Barrimond got in position about the fourth or fifth officer in
14 the entry stick. (DSUF, No. 191) Officer Garrison continued to
15 knock without anyone from within the residence opening the door.
16 (DSUF, No. 193) The team waited a long enough period of time
17 before receiving a response from within the residence, that
18 Sergeant Barrimond almost ordered the team to force entry by
19 using the breaching device. (DSUF, No. 194)

20 During the knocking he heard a voice from within the home.
21 Finally the occupant of the home unlocked the door at which point
22 Sergeant Barrimond gave the command, "let's go". (DSUF, No.
23 195) Sergeant Barrimond was concerned about the officers being
24 in the "funnel of death" because they did not know whether there
25 was anyone within the residence who had weapons. (DSUF, No. 196)
26 The officers had a disadvantage because the sunlight was behind
27 them, so they were backlit and the interior of Plaintiff's
28 residence was somewhat dark. (DSUF, No. 197)

1 After making entry, Sergeant Barrimond's eyes had to
2 acclimate to the dimness of the house. (DSUF, No. 198) After
3 the residence was secured, Sergeant Barrimond focused his
4 attention on Plaintiff who was leaning on a chair, and the
5 children who were on the couch in the living room. (DSUF, No.
6 199)

7 Sergeant Barrimond helped Plaintiff get seated on a chair
8 and explained to her why the officers were there and the purpose
9 of their search. (DSUF, No. 200) He advised her that the
10 officers were looking for guns and gang-related items pursuant to
11 a search warrant. (DSUF, No. 201) Sergeant Barrimond then began
12 talking to the children and tried to calm them down by making
13 funny faces and small talk to try and make them comfortable.
14 (DSUF, No. 202) He asked Plaintiff if the kids needed to be
15 changed, fed or taken care of in any way. (DSUF, No. 203)

16 Officer Garrison explained to Sergeant Barrimond that when
17 he went in through the door, someone grabbed for his gun arm, so
18 he pushed them away. (DSUF, No. 204) Sergeant Barrimond
19 understood that in the heat of the moment, the normal reflex for
20 a person who is concerned for the safety of children in her
21 residence, is to challenge a person coming into the residence
22 with a gun, which would include grabbing at that person. (DSUF,
23 No. 205)

24 Officers have discretion as to how to evaluate a tactical
25 situation. Plaintiff was not arrested or cited for her offense,
26 nor was she ever patted down, searched, placed in handcuffs or
27 restrained in any other way. In fact, she was allowed to use the
28 telephone to receive and make phone calls. (DSUF, No. 206)

1 Sergeant Barrimond asked Plaintiff if she was okay and
2 whether or not she would like an ambulance called. (DSUF, No.
3 195) Plaintiff complained of hip pain but refused the offer to
4 have an ambulance called. (DSUF, No. 207) Nevertheless, Sergeant
5 Barrimond directed Officer Garrison to call an ambulance because
6 he wanted to make sure she was okay. When the paramedics
7 arrived, Plaintiff refused treatment by them. (DSUF, No. 208)

8 After the search, Sergeant Barrimond ensured that all his
9 officers had their equipment and materials before leaving
10 Plaintiff's residence. (DSUF, No. 209) At some point after the
11 search, Sergeant Barrimond contacted Detective Yee to advise him
12 that suspect Darryl Hilliard was not at Plaintiff's location.
13 (DSUF, No. 211) Detective Yee responded that Darryl Hilliard was
14 apprehended at another location and was in custody. (DSUF, No.
15 212)

16 9. Oversight and Training of Fresno Police Officers

17 Officer Yee and Garrison are obligated to comply with the
18 ongoing training requirements of the Department. (DSUF, No. 228)

19 C. Disputed Facts

20 1. Facts Relevant to Obtaining the Search Warrant

21 Freeman disputes the fact that Detective Yee received
22 credible information from reliable sources, including
23 confidential informants, and continued to monitor the information
24 provided to him from those informants. (DSUF, No. 4). Freeman
25 also disputes that the twenty-four page statement of probable
26 cause in support of the Search Warrant accurately described the
27 one and a half year investigation arising out of the gang related
28 shootings in Fresno and other criminal acts committed by members

1 of the West Side Strother Boys and Garrett Street gangs. (DSUF,
2 No. 6)

3 Freeman argues that Detective Yee's affidavit lacked
4 adequate foundation for the reliability of any of the
5 confidential and/or anonymous sources. (PSDF, No. 1) Freeman
6 also argues that Detective Yee lacked personal corroboration
7 information regarding the confidential/anonymous sources which
8 had been deemed "reliable by Officers other than Detective Yee.

9 i. Detective Yee's Use of Confidential Informants and
10 Witnesses in His Affidavit

11 Detective Yee failed to do anything to personally assess the
12 credibility of Confidential Informant #1. (PSDF, No. 3) Freeman
13 also argues that Detective Yee did not affirmatively establish
14 the following:

- 15 1. whether both officers Eddy and Cardinelli⁵ utilized
16 Confidential Informant #1. (PSDF, No. 4)
- 17 2. whether said officers vouched for the reliability of
18 Confidential Informant #1. (PSDF, No. 5)
- 19 3. the particular factors upon which said Officers based their
20 opinions as to the reliability of Confidential Informant #1.
21 (PSDF, No. 6)

22 Freeman also argues that during his deposition, Detective
23 Yee could not remember who the witnesses were who he listed on
24 page 13 of his affidavit. (PSDF, No. 7) Yee did not author
25 reports concerning the page 13 witnesses and could not
26

27 ⁵ Officers Eddie and Cardinelli are not parties to this
28 dispute.

1 affirmatively establish the existence of written reports. (PSDF,
2 No. 8) Yee also never spoke to the page 13 witnesses or
3 determined the reliability of page 13 witnesses. (PSDF, No. 9 -
4 10)

5 Detective Yee did not speak to any of the witness listed on
6 page 15, lines 3-11, of his Affidavit. (PSDF, No. 11) Further,
7 Detective Yee determined the reliability of the anonymous caller
8 on page 15 of his affidavit by traveling to the Cooley Plaza
9 Apartments and determining that Antoinette Hilliard's vehicle was
10 parked at said location. (PSDF, No. 12)

11 Detective Yee did not write a report concerning said page 15
12 anonymous caller. (PSDF, No. 13) Detective Yee did not know the
13 identity of the page 15 anonymous caller. (PSDF, No. 14)
14 Detective Yee did not take any steps to independently corroborate
15 the trustworthiness of the witness listed in his search warrant
16 affidavit at page 15. (PSDF, No. 15)

17 Detective Yee's search warrant affidavit at page 16, relies
18 upon an anonymous source, who Detective Yee did not speak to, nor
19 did he write a report concerning this anonymous source's
20 information. (PSDF, No. 19) Detective Yee did not corroborate
21 the accuracy of the page 16 anonymous source's information.
22 (PSDF, No. 20)

23 Detective Yee did not know the identity of the confidential
24 informant #2 listed on page 16, line 330 of his affidavit. (PSDF,
25 No. 21) Detective Yee did not "handle" Confidential Informant
26 #2. (PSDF, No. 22) Detective Yee did not know which officer
27 handled Confidential Informant #2. (PSDF, No. 23) Detective Yee
28 did not know who determined that confidential informant #2 was

1 trustworthy. (PSDF, No. 24) Detective Yee surmised that since
2 the information turned out to be true that confidential informant
3 #2 would be deemed trustworthy. (PSDF, No. 25)

4 Detective Yee knew the identity of the confidential
5 informant #3 listed on page 17 line 357 of his affidavit. (PSDF,
6 No. 26) Detective Yee did not handle confidential informant #3,
7 prior to authorizing the search warrant affidavit. (PSDF, No. 27)
8 Detective Yee determined that confidential informant #3's
9 trustworthiness and reliability were established based upon what
10 other detectives told him. (PSDF, No. 28) Detective Yee did not
11 know "specifically" how confidential informant #3 was deemed
12 reliable by those other officers. (PSDF, No. 29) Detective Yee
13 indicated that confidential informant #3 had not been paid for
14 any information contained in the search warrant affidavit. (PSDF,
15 No. 30)

16 Detective Yee indicated that confidential informant #3 had
17 been paid in the past by other detectives. (PSDF, No. 31)
18 Detective Yee stated that the services of confidential informants
19 were utilized in coming to the conclusion that Darryl Hilliard
20 had committed assault with a deadly weapon. (PSDF, No. 34)

21 Detective Yee indicates that the reliability of the
22 informants is contained within the "sealed" Hobbs portion of the
23 search warrant affidavit. (PSDF, No. 35) Detective Yee did not
24 include his allegation that D. Hilliard went into Freeman's
25 house, within his search warrant affidavit. (PSDF, No. 36)

26 ii. Monique Thomas

27 Detective Yee admitted that he did not take Monique Thomas's
28 complaint and that he knew that Detective Andreas and Torres were

1 unable to corroborate her information. (PSDF, No. 16 and No. 53)
2 Detective Yee knew that there were inconsistencies in Monique
3 Thomas' statements and further knew that Detective Andrews' and
4 Torres' were unable to corroborate her information. (PSDF, No.
5 17)

6 Detective Yee knew that Mr. Green, another potential victim
7 in the alleged attempted shooting of Monique Thomas, gave a
8 different account of said alleged shooting, inconsistent with Ms.
9 Thomas's account. (PSDF, No. 18)

10 2. Detective Yee's Investigation

11 i. History of the Investigation

12 Freeman does not dispute most of the facts in the record
13 regarding the extensive incidents of violence between Strother
14 Boys and Garret Street gangs. However Freeman disputes
15 Defendants contention that on February 13, 2003 Monique Thomas
16 ("Thomas"), the girlfriend of Garrett Street gang member Monette
17 Solomon, was allegedly shot near Martin Luther King Jr. Boulevard
18 and Florence Avenues. (DSUF, No. 18) Freeman disputes the fact
19 that Thomas was the passenger in a vehicle driven by Robin Green
20 when they were shot at by Strother Boys gang members Daniel Pena
21 and Darryl Hilliard. (*Id.*) Freeman also disputes that Thomas
22 related that Pena leaned out of the passenger's side of
23 Hilliard's light blue Ford Mustang that had pulled alongside of
24 her, that Pena started shooting at them with an assault-type
25 rifle, striking the vehicle in which she was traveling in, and
26 that Thomas recognized Pena and Hilliard on sight. (*Id.*)

27 ///

28 ///

1 ii. Detective Yee's Conclusions of the Investigation -
2 Confidential Facts

3 Freeman disputes that Detective Yee's Affidavit was also
4 supported by a "Confidential Attachment" which set forth
5 additional information he considered in making his determination
6 that there was probable cause to request the issuance of the
7 Search Warrant. (DSUF, No. 52) Freeman also disputes that the
8 information within the "Confidential Attachment" was provided to
9 Detective Yee by confidential informant(s) and could not be
10 included in the Affidavit. (DSUF, No. 53)

11 Detective Yee confirmed that Darryl Hilliard was only
12 charged for Health and Safety Code 11351.5, Possession of
13 Marijuana for Sale, and committing a crime while out on bail.
14 (PSDF, No. 32) According to Freeman, Detective Yee stated there
15 was no probable cause to believe Darryl Hilliard had committed
16 murder, attempted murder, or conspiracy to commit murder. (PSDF,
17 No. 33.)

18 iii. Facts Regarding Detective Yee's Request for a
19 Search Warrant

20 Freeman disputes the following facts set forth in
21 Defendants' statement of undisputed facts:

- 22 1. That Detective Yee requested a search warrant for
23 ten (10) residences in Fresno County of suspects
24 or affiliates who, based upon his investigation,
25 he believed were in possession of weapons and
26 gang indicia that had been used in the gang
27 related shootings he was investigating. (DSUF,
28 No. 56)
2. that surveillance conducted of Darryl Hilliard,
determined an association between him and these
ten residences. (DSUF, No. 57) that Yee also
believed there was a strong possibility that said
property was located at the locations set forth in

Attachment "A" to the Affidavit. (DSUF, No. 61)

3. that the Search Warrant was considered a "high risk" Search Warrant because it involved the search for numerous weapons, mostly firearms and gang indicia, suspected to have been used in numerous gang-related shootings between rival criminal street gangs; and which were believed to be located at those residences associated with gang members. (DSUF, No. 62)

4. that all of the information Detective Yee presented to Judge Jones was accurate and truthful and at no time did he mislead or make any misrepresentations to him. (DSUF, No. 65)

5. that Detective Yee had a good faith belief that there was sufficient probable cause to justify the issuance of the Search Warrant for the search of the ten residences. (DSUF, NO. 66)

6. that Yee also had a good faith belief that the warrant was not overbroad.

7. that Detective Yee had no reason to believe that the warrant was unlawful or otherwise invalid in any respect and signed it under penalty of perjury. (DSUF, NO. 67)

8. that Detective Yee disclosed to Judge Jones information pertaining to the reliability of the confidential informant(s). (DSUF, NO. 68)

iv. Disputed Facts Relating to Freeman's Residence and

It's Proximity to Gang Activity

Freeman disputes Defendants contention that her granddaughter, Shatera Dillingham, had lived with her for a significant period of time before the search. (DSUF, No. 87) Freeman also disputes that Ms. Dillingham was the girlfriend of suspect, Darryl Hilliard and the mother of his child; and Plaintiff provided care and babysitting for Darryl Hilliard's child on a daily basis. It is also disputed that on the day of the search, Ms. Dillingham drove by her grandmother's home, saw law enforcement officers there, but did not stop, instead, kept

1 driving because she got nervous. (DSUF, No. 88)

2 Freeman further disputes the following:

- 3 1. Shatera Dillingham was observed with Darryl
4 Hilliard more than half the time he was under
surveillance. (DSUF, No. 90)
- 5 2. During this surveillance, Hilliard was observed
6 being dropped off at the Plaintiff's residence by
his mother, and seen walking to her front door.
7 (DSUF, No. 91)
- 8 3. Detectives no longer saw Hilliard and determined
he went inside Plaintiff's residence. (DSUF, No.
9 94)
- 10 4. His girlfriend, Shatera Dillingham, was driving
Plaintiff's vehicle. (DSUF, No. 96)
- 11 5. Hilliard exited his mother's residence and got
12 into Plaintiff's vehicle with his girlfriend,
Shatera Dillingham, driving. (DSUF, No. 100)
- 13 6. Darryl Hillard later left his mother's residence
14 as a passenger in Plaintiff's car. (DSUF, No.
102)
- 15 7. Later that same day, Hilliard was driven in
16 Plaintiff's car to a residence on Tuolomne street.
(DSUF, No. 103)
- 17 8. On February 2, 2004 at approximately 4:28 p.m.,
18 Hilliard was driven to the Plaintiff's residence,
where he exited the vehicle and walked inside the
19 house and remained there briefly. (DSUF, No. 104)
- 20 9. Detective Yee determined that it was likely that
Darryl Hilliard possessed weapons used in the
21 rival gang shootings and other criminal indicia.
Hilliard could have circulated them among his
22 fellow gang members including his girlfriend,
Shatera Dillingham. (DSUF, No. 107)
- 23 10. Plaintiff's home had been searched on at least
24 three occasions prior to this incident. (DSUF,
No. 246)

25 According to Freeman, Shatera Dillingham was no longer the
26 girlfriend of Darryl Hilliard on February 2, 2004. (PSDF, No. 54)

27 ///

28 ///

3. Facts Relevant to the Service of the Search Warrant

i. Search of Freeman's Residence

Freeman disputes the following facts:

1. The officers were unable to see through the locked security door and could not tell whether or not the interior door was opened. (DSUF, No. 129)
2. Officer Garrison knocked loudly on the door and shouted words similar to, "Police Department, Search Warrant, Open the door!" several times. (DSUF, No. 132)
3. Again, Officer Garrison shouted, "Police Department, Search Warrant, Open the door!" (DSUF, No. 135)
4. Defendants served the Search Warrant lawfully, professionally and ethically. (DSUF, No. 158)
5. All the officers understood that Darryl Hilliard or any of his fellow gang members or affiliates could be at Plaintiff's residence and possibly armed. (DSUF, No. 224)
6. Given the totality of the available information, including two independent civilian witnesses, Defendants' Police Practices Expert, Joseph Callanan agrees that these officers complied with standard police procedures in their approach to the Plaintiff's residence and in their verbal announcements attempting to identify themselves, establish the reason for their presences, and demand entry. From a law enforcement perspective, the described police procedures fully comport with professional training based on both federal and state guidelines. (DSUF, No. 227)

On February 2, 2004, Shatera Dillingham was not a resident of 139 W. Eden Ave. (PSDF, No. 50)

ii. Officer Garrison's Entry

The following facts are also disputed:

1. Within seconds and a foot or two within the front doorway, Officer Garrison felt someone (Plaintiff) grab his right arm, which was holding his gun. (DSUF, No. 143)
2. Officer Higgins, who was directly behind Officer Garrison, and who was standing in the doorframe,

1 saw Plaintiff grab Officer Garrison's gun arm.
(DSUF, No. 144)

2
3 3. Deputy Capriola, who was directly behind Officer
4 Higgins and who was just outside the doorframe,
also saw Plaintiff grab Officer Garrison's gun
arm. (DSUF, No. 145)

5 4. Upon feeling someone grab his arm, Officer
6 Garrison's immediate reaction was to use his left
7 hand and push away the threat, which he perceived
to be someone attempting to disarm him. (DSUF,
No. 149)

8 5. As Officer Garrison pushed Plaintiff away from
9 him, she continued to grab onto his arm, thereby
10 causing the two to lose balance, entangle their
feet, and Plaintiff fell over the arm of a chair
then to the ground. (DSUF, No. 151)

11 6. Officer Garrison struggled with keeping his
12 balance but was able to stay on his feet and he
13 proceeded down the hall toward the back of the
house to clear the residence. (DSUF, No. 152)

14 7. At the moment Officer Garrison felt the physical
15 contact on his arm, he had no idea whether this
person was the suspect, a fellow gang member or an
innocent bystander. (DSUF, No. 225)

16 (a) Freeman's Allegations

17 Freeman testified that the Officers did not knock on the
18 front door, but instead, she saw them through a window and went
19 to open the door. (DSUF, No. 213) According to Freeman after
20 Plaintiff was knocked onto the floor, Officer Garrison told her
21 to get up or he would shoot her. (DSUF, No. 214 - 215)

22 Freeman denied having any dealings with gang members.
23 (PSDF, No. 47) Further, Freeman was visibly upset. (PSDF, No.
24 48) According to Freeman upon entry Garrison shouted to
25 Freeman, "Get down on the ground or I'll shoot you!" (PSDF, No.
26 51) As a direct result of the excessive force applied by the
27 Defendants, Freeman alleges that she suffered severe physical
28 and emotional injuries. (PSDF, No. 55)

1 iii. Deputy Capriola's Entry

2 Freeman disputes that as Deputy Capriola stood just outside
3 the doorway, he saw a hand from his right peripheral vision,
4 reach out and grab Officer Garrison's right, gun arm. (DSUF,
5 No. 170) Freeman also disputes that Deputy Capriola immediately
6 perceived this as a threat and thought this person was grabbing
7 for Officer Garrison's handgun. (DSUF, No. 171)

8 iv. Sergeant Barrimond

9 Freeman disputes the following facts:

- 10 1. When Sergeant Barrimond reached Plaintiff's front
11 door, he positioned himself underneath the front
12 window and waited while Officer Garrison knocked
loudly on the metal, security door and gave the
appropriate notice. (DSUF, No. 192)
- 13 2. Barrimond indicated hearing a female voice from
14 inside 139 W. Eden when they started knocking.
(PSDF, No. 37)
- 15 3. Barrimond recalled the voice as saying either
16 "I'm coming" or "who is it?" (PSDF, No. 38)
- 17 4. Barrimond noted that the team had a ram and a
pick to force entry if necessary. (PSDF, No. 39)
- 18 5. Barrimond gave the command "let's go" as soon as
19 he saw Ms. Freeman's door knob turn. (PSDF, No.
40)
- 20 6. Barrimond lost sight of the first member of the
21 entry team for seconds. (PSDF, No. 41)
- 22 7. Barrimond confirmed that all members of the entry
23 team had their weapons drawn upon entry. (PSDF,
24 No. 42)
- 25 8. Right after the point of entry, Barrimond did not
26 notice Freeman and he didn't really pay attention
to her. (PSDF, No. 43)
- 27 9. Upon entry, Barrimond saw and heard little
28 children crying. (PSDF, No. 44)
10. Barrimond entered the house yelling at people to
get down on the ground. (PSDF, No. 45)

11. Barrimond was unable to see Freeman upon first entry. (PSDF, No. 49)

4. Oversight and Training of Fresno Police Officers

Freeman disputes the following with respect to the oversight and training of police officers:

1. Officers employed with the Fresno Police Department are given training over and above that required by POST, (Peace Officer Standards and Training) the commission which regulates training for law enforcement officers in California. (DSUF, No. 229)

2. The Fresno Police Department had training units that ensured that the officers employed by the Department received training in compliance with POST. (DSUF, No. 230)

3. The training provided to officers employed by the Department meets or exceeds POST guidelines. (DSUF, No. 231)

4. Prior to February 19, 2004, the Fresno Police Department provided training to all their officers including those assigned to the M.A.G.E.C. Unit receive training on topics, including but not limited to: (1) the appropriate means and manner of conducting a search and seizure, in light of the totality of the circumstances faced by the officers; (2) proper use of force; (3) proper investigation and acquisition of search warrants. (DSUF, No. 232)

5. New police officer recruits are required go through a field training program and are required to complete 24 hours of POST training every 24 months. They also undergo a rigorous sixteen week training program which includes training on the appropriate use of force, including lethal force. (DSUF, No. 233)

6. Officers are also provided training in the use of force, including lectures and scenario-based performances. The Fresno Police Department's policy regarding the use of force is part of the instruction given in any class in which the use of force is reviewed. (DSUF, No. 234)

7. Plaintiff's retained police procedural matters expert, Roger Clark, has expressed his opinion in this case, the training provided by Fresno Police Department to its police officers is consistent

with POST mandates. (DSUF, No. 235)

8. At all times relevant to this lawsuit, it has been the policy of the Fresno Police Department to conduct thorough internal investigations into allegations of misconduct by employees of the Department. (DSUF, No. 238)

9. It has also been the policy of the Fresno Police Department to take sufficient corrective action to prevent their employees from committing constitutional violations, or any violations of state or federal law. (DSUF, No. 239)

10. At no time relevant to this lawsuit has the Fresno Police Department had any policies, practices or customs of the following: (1) tolerating the use of excessive or unjustified force; (2) allowing constitutional violations by encouraging unlawful police activity, withholding or concealing material information from a search warrant; (3) performing pretextual investigations that vindicate and ratify an officer's misconduct; (4) taking insufficient corrective actions to prevent alleged patterns of constitutional violations from continuing; (5) delegation of obligations to manage, supervise, train and control officers; and/or (6) avoiding proper public oversight of the actions of officers. (DSUF, No. 240)

11. The hiring process for new recruits with the Fresno Police Department includes, among other matters, obtaining a background check and a psychological evaluation of the applicant prior to hiring. The applicant's propensity toward untruthfulness is tested and used as a basis of exclusion of potential applicants. (DSUF, No. 241)

12. New recruits are required to undergo a rigorous sixteen week training program which includes training on the appropriate use of force. (DSUF, No. 242)

IV. STANDARD OF REVIEW

A. Summary Judgment Standard

Summary judgment is warranted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

1 genuine issue as to any material fact." Fed. R. Civ. P. 56©;
2 *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998).
3 Therefore, to defeat a motion for summary judgment, the non-
4 moving party must show (1) that a genuine factual issue exists
5 and (2) that this factual issue is material. *Id.* A genuine
6 issue of fact exists when the non-moving party produces evidence
7 on which a reasonable trier of fact could find in its favor
8 viewing the record as a whole in light of the evidentiary burden
9 the law places on that party. See *Triton Energy Corp. v. Square*
10 *D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995); see also *Anderson v.*
11 *Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986). Facts are
12 "material" if they "might affect the outcome of the suit under
13 the governing law." *Campbell*, 138 F.3d at 782 (quoting
14 *Anderson*, 477 U.S. at 248).

15 The nonmoving party cannot simply rest on its allegations
16 without any significant probative evidence tending to support
17 the complaint. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th
18 Cir. 2001).

19 [T]he plain language of Rule 56(c) mandates the
20 entry of summary judgment, after adequate time
21 for discovery and upon motion, against a party
22 who fails to make a showing sufficient to
23 establish the existence of an element essential
24 to the party's case, and on which that party
25 will bear the burden of proof at trial. In
such a situation, there can be "no genuine
issue as to any material fact," since a
complete failure of proof concerning an
essential element of the nonmoving party's case
necessarily renders all other facts immaterial.

26 *Celotex Corp. v. Catrell*, 477 U.S. 317, 322-23 (1986). The more
27 implausible the claim or defense asserted by the nonmoving
28 party, the more persuasive its evidence must be to avoid summary

1 judgment. See *United States ex rel. Anderson v. N. Telecom,*
2 *Inc.*, 52 F.3d 810, 815 (9th Cir. 1996). Nevertheless, the
3 evidence must be viewed in a light most favorable to the
4 nonmoving party. *Anderson*, 477 U.S. at 255. A court's role on
5 summary judgment is not to weigh evidence or resolve issues;
6 rather, it is to determine whether there is a genuine issue for
7 trial. See *Abdul-Jabbar v. G.M. Corp.*, 85 F.3d 407, 410 (9th
8 Cir. 1996).

9 B. Summary Judgment in a Qualified Immunity Case

10 In this case, Defendants assert the defense of qualified
11 immunity on behalf of all the individual defendants. Deciding
12 qualified immunity entails a two-step analysis. First, a court
13 must ask whether a constitutional violation occurred at all. If
14 the answer to this question is yes, the court must then inquire
15 whether the right violated was "clearly established" by asking
16 whether a reasonable officer could believe that the defendant's
17 actions were lawful. See *Saucier v. Katz*, 533 U.S. 194, 201
18 (2001).

19 The traditional summary judgment approach should be used in
20 analyzing the first step of the *Saucier* analysis:

21 A court required to rule upon the qualified immunity
22 issue must consider, then, this threshold question:
23 Taken in the light most favorable to the party
24 asserting the injury, do the facts alleged show the
25 officer's conduct violated a constitutional right?
Where the facts are disputed, their resolution and
determinations of credibility are manifestly the
province of a jury.

26 *Wall v. County of Orange*, 364 F.3d 1107, 1110-1111 (9th Cir.
27 2004) (internal citations and quotations omitted). In the
28 second step, the court must ask whether it would be clear to a

1 reasonable officer that his conduct was unlawful in the
2 situation confronted. Although this inquiry is primarily a
3 legal one, where the reasonableness of the officer's belief that
4 his conduct was lawful "depends on the resolution of disputed
5 issues of fact...summary judgment is not appropriate." *Wilkins*
6 *v. City of Oakland*, 364 F.3d 949, 1110-11 (9th Cir. 2003)
7 (citing *Saucier*, 533 U.S. at 216 (Ginsburg J., concurring)).

8 C. Civil Rights Claims Under 42 U.S.C. section 1983

9 "Section 1983 provides for liability against any person
10 acting under color of law who deprives another 'of any rights,
11 privileges, or immunities secured by the Constitution and laws'
12 of the United States." *S. Cal. Gas Co. v. City of Santa Ana*,
13 336 F.3d 885, 887 (9th Cir. 2003) (quoting 42 U.S.C. § 1983).

14 "The rights guaranteed by section 1983 are 'liberally and
15 beneficently construed.'" *Id.* (quoting *Dennis v. Higgins*, 498
16 U.S. 439, 443 (1991)). Pursuant to 42 U.S.C. § 1983, Plaintiff
17 may bring a civil action for deprivation of rights under the
18 following circumstances:

19 Every person who, under color of any statute,
20 ordinance, regulation, custom, or usage, of any State
21 or Territory or the District of Columbia, subjects, or
22 causes to be subjected, any citizen of the United
23 States or other person within the jurisdiction thereof
24 to the deprivation of any rights, privileges, or
25 immunities secured by the Constitution and laws, shall
26 be liable to the party injured in an action at law,
27 suit in equity, or other proper proceeding for
28 redress, except that in any action brought against a
judicial officer for an act or omission taken in such
officer's judicial capacity, injunctive relief shall
not be granted unless a declaratory decree was
violated or declaratory relief was unavailable. For
the purposes of this section, any Act of Congress
applicable exclusively to the District of Columbia
shall be considered to be a statute of the District of
Columbia.

1 D. Fourth Amendment

2 Under the Fourth Amendment the right of the people to be
 3 secure in their persons, houses, and effects, against
 4 unreasonable searches and seizures, shall not be violated. U.S.
 5 Const. amend. IV.; *Menotti v. City of Seattle*, 409 F. 3d 1113,
 6 1152 (9th Cir. 2005). The Supreme Court has held that "in the
 7 ordinary case, seizures of personal property are unreasonable
 8 within the meaning of the Fourth Amendment, without more, unless
 9 accomplished pursuant to a judicial warrant issued by a neutral
 10 and detached magistrate after finding probable cause. *Id.*
 11 However, when faced with special law enforcement needs, the
 12 Supreme Court has found that certain general, or individual,
 13 circumstances may render a warrantless search or seizure
 14 reasonable. *Id.*

15 E. The Monell Doctrine

16 Local governments⁶ are "persons" subject to suit for
 17 "constitutional tort[s]" under 42 U.S.C. § 1983.⁷ *Haugen v.*
 18

19 ⁶ Although *Monell* dealt with a municipal government's
 20 liability under § 1983, the standard there announced was
 21 more broadly framed in terms of "a local government." *Brass*
v. County of L.A., 328 F.3d 1192, 1198 (9th Cir. 2003).

22 ⁷ "There is certainly no constitutional impediment to
 23 municipal liability. 'The Tenth Amendment's reservation of
 24 nondelegated powers to the States is not implicated by a
 25 federal-court judgment enforcing the express prohibitions of
 26 unlawful state conduct enacted by the Fourteenth
 27 Amendment.'" *Monell*, 436 U.S. 691 (quoting *Milliken v.*
Bradley, 433 U.S. 267, 291 (1977)). There is no "basis for
 28 concluding that the Eleventh Amendment is a bar to municipal
 liability." *Id.* (citing *Fitzpatrick v. Bitzer*, 427 U.S.
 445, 456 (1976); *Lincoln County v. Luning*, 133 U.S. 529, 530
 (1890)).

1 *Brosseau*, 339 F.3d 857, 874 (9th Cir. 2003) (citing *Monell v.*
 2 *Dep't of Soc. Servs.*, 436 U.S. 658, 691 n.55 (1978)) (also
 3 finding the fact that "local governments can be sued under § 1983
 4 necessarily decides that local government officials sued in their
 5 official capacities are "persons" under § 1983 in those cases in
 6 which, as here, a local government would be suable in its own
 7 name"). "[T]he legislative history of the Civil Rights Act of
 8 1871 compels the conclusion that Congress did intend
 9 municipalities and other local government units to be included
 10 among those persons to whom § 1983 applies." *Id.* at 690. "Local
 11 governing bodies, therefore, can be sued directly under § 1983
 12 for monetary, declaratory, or injunctive relief where, as here,
 13 the action that is alleged to be unconstitutional implements or
 14 executes a policy statement, ordinance, regulation, or decision
 15 officially adopted and promulgated by that body's officers...[or
 16 for] deprivations visited pursuant to governmental 'custom' even
 17 though such a custom has not received formal approval through the
 18 body's official decision making channels."⁸ *Id.* 690-91.

21 8 In *Brass v. County of Los Angeles*, the Ninth Circuit
 22 followed evolution of municipal liability from *Monroe* to
Monell:

23 In *Monroe v. Pape*, 365 U.S. 167 [] (1961), the
 24 Supreme Court held that municipal corporations
 25 were not subject to liability under § 1983. In
 26 *Monell*, 436 U.S. at 665, the Court, based upon
 27 its "fresh" review of the legislative history of
 28 the Civil Rights Act of 1871 (the statutory
 predecessor to § 1983), "overrule[d] *Monroe v.*
Pape...insofar as it holds that local
 governments are wholly immune from suit under §
 1983." *Id.* at 663 (footnote omitted). The

1 A local government's liability is limited. Although a local
2 government can be held liable for its official policies or
3 customs, it will not be held liable for an employee's actions
4 outside of the scope of these policies or customs. "[T]he
5 language of § 1983, read against the background of the same
6 legislative history, compels the conclusion that Congress did not
7 intend municipalities to be held liable unless action pursuant to
8 official municipal policy of some nature caused a constitutional
9 tort. In particular, ...a municipality cannot be held liable
10 solely because it employs a tortfeasor, in other words, a
11 municipality cannot be held liable under § 1983 on a respondeat
12 superior theory." *Monell*, 436 U.S. at 691. The statute's
13 "language plainly imposes liability on a government that, under
14 color of some official policy, [that] 'causes' an employee to
15 violate another's constitutional rights." *Id.* at 692.
16 Therefore, "a local government may not be sued under § 1983 for
17 an injury inflicted solely by its employees or agents. Instead,
18 it is when execution of a government's policy or custom, whether
19 made by its law-makers or by those whose edicts or acts may

21 Court, however, upheld *Monroe* "insofar as it
22 holds that the doctrine of respondeat superior
23 is not a basis for rendering municipalities
24 liable under § 1983 for the constitutional torts
25 of their employees." *Id.* at 663 n.7. It stated
26 that "the language of § 1983, read against the
27 background of the same legislative history,
28 compels the conclusion that Congress did not
intend municipalities to be held liable unless
action pursuant to official municipal policy of
some nature caused a constitutional tort." *Id.*
at 691.

328 F.3d at 1198.

1 fairly be said to represent official policy, inflicts the injury
2 that the government as an entity is responsible under § 1983."
3 *Id.* at 694.

4 F. Suits Against Government Officials: Official Capacity and
5 Individual Capacity Suits

6 "1983 claims against government officials in their official
7 capacities are really suits against the governmental employer
8 because the employer must pay any damages awarded." *Butler v.*
9 *Elle*, 281 F.3d 1014, 1023 (9th Cir. 2002) (citing *Ky. v. Graham*,
10 473 U.S. 159, 165-66 (1985)); see also *Doe v. Lawrence Livermore*
11 *Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997) (finding that "a
12 suit against a state official in his official capacity is no
13 different from a suit against the [official's office or the]
14 State itself") (citing *Will v. Mich. Dep't of State Police*, 491
15 U.S. 58, 70-71 (1989). In such suits, the real party in interest
16 is the entity for which the official works. *Hafer v. Melo*, 502
17 U.S. 21, 25 (1991). A federal action for monetary damages
18 against an individual state official acting in his official
19 capacity is barred by the Eleventh Amendment in the same way that
20 an action against a State is barred. *Doe v. Lawrence Livermore*
21 *Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997). "As the Supreme
22 Court has stated, 'official-capacity suits...generally represent
23 only another way of pleading an action against an entity of which
24 an officer is an agent.'" *Ruvalcaba v. City of Los Angeles*, 167
25 F.3d 514, 524 n.3 (9th Cir. 1999) (quoting *Graham*, 473 U.S. at
26 165). "'As long as the government entity receives notice and an
27 opportunity to respond, an official-capacity suit is, in all
28 respects other than name, to be treated as a suit against the

1 entity.'" *Ruvalcaba*, 167 F.3d at 524 n.3 (quoting *Graham*, 473
2 U.S. at 166.)

3 By contrast, "[p]ersonal-capacity suits seek to impose
4 personal liability upon a government official for actions [taken]
5 under color of state law." *Dittman v. California*, 191 F.3d 1020,
6 1027 (9th Cir. 1999) (citing *Kentucky v. Graham*, 473 U.S. 159, 165
7 (1985)) (internal quotations omitted). To establish personal
8 liability in a §1983 or §1985 action, it is enough to show that
9 the official, "acting under color of state law, caused the
10 deprivation of a federal right." *Hafer*, 502 U.S. at 25 (internal
11 quotations omitted). Public officials sued in their personal
12 capacity may assert personal liability defenses, such as
13 qualified immunity. *Dittman*, 191 F.3d at 1027.

14 V. DISCUSSION

15 A. Federal Claims

16 1. Qualified Immunity of the Individual Defendant Officers

17 Defendants assert qualified immunity for the individual
18 officers in this case. Qualified immunity grows out of the
19 policy concern that few individuals would enter public service if
20 they risked personal liability for their official decisions.
21 *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). The immunity
22 protects "all but the plainly incompetent or those who knowingly
23 violate the law," *Hunter v. Bryant*, 502 U.S. 224, 228 (1991),
24 and "spare[s] a defendant not only unwarranted liability, but
25 unwarranted demands customarily imposed upon those defending a
26 long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232
27 (1991). Qualified immunity is not a defense on the merits; it is
28 an "entitlement not to stand trial or face the burdens of

1 litigation" that may be overcome only by a showing that (1) a
2 constitutional right was in fact violated and (2) no reasonable
3 officer could believe defendant's actions were lawful in the
4 context of fact-specific, analogous precedents. *Saucier v. Katz*,
5 533 U.S. 194, 200-202 (2001).

6 Here, Freeman alleges that Defendant Officers violated her
7 Fourth Amendment right based on an allegedly unreasonable search
8 and seizure of her home. Freeman claims the search and seizure
9 was illegal because (1) Detective Yee's affidavit in support of
10 the warrant contained material misrepresentations and failed to
11 establish probable cause and (2) Defendants Garrison, Capriola,
12 Barrimond, Hollins, Perez, and Simons "acted unreasonably" and
13 with excessive force⁹ in their conduct in executing said warrant
14 and detaining plaintiff.¹⁰ Because it is undisputed that
15 Detective Yee was not present during the execution of the search
16 warrant, Freeman's claims require a different qualified immunity
17 inquiry for Detective Yee than the remaining Defendant Officers.

18 i. Detective Yee

19 Freeman can only survive summary judgment on a Yee's defense
20 of qualified immunity if she can establish both (1) a substantial
21

22 ⁹ Plaintiff offers a litany of facts that would support an
23 excessive force claim. However, Plaintiff has not asserted a
24 Fourth Amendment violation based on excessive force. Such facts
25 are still relevant to the reasonableness of executing the search
26 warrant.

27 ¹⁰ In their motion papers the parties make arguments in
28 reference to alleged excessive use of force. However, Freeman
does not bring an excessive use of force claim. For the purposes
of this motion the inquiry as to the individual officers' inquiry
is limited to their actions in reliance on the executed search
warrant.

1 showing of a deliberate falsehood or reckless disregard by Yee
2 and (2) that but for the dishonestly included or omitted
3 information, the magistrate would not have issued the warrant.
4 *Butler v. Elle*, 281 F.3d 1014, (9th Cir. 2002); *Hervey v. Estes*,
5 65 F. 3d 784, 789 (9th Cir. 1995) Put another way, Freeman must
6 establish that the remaining information in the affidavit is
7 insufficient to establish probable cause. *Hervey*, 65 F. 3d at
8 789.

9 (a) Freeman Fails to Show a Substantial Showing
10 by Yee's of Deliberate Falsehood or Reckless
11 Disregard

12 If an officer submitted an affidavit that contained
13 statements he knew to be false or would have know to be false had
14 he not recklessly disregarded the truth, he cannot be said to
15 have acted in an objectively reasonable manner. *Butler v. Elle*,
16 281 F.3d 1014, 1024 (9th Cir. 2002.)

17 Plaintiff argues that Yee had knowledge his affidavit
18 contained false statements. According to Plaintiff, Yee did not
19 take Monique Thomas' complaint and he knew that Detective Andreas
20 and Torres were unable to corroborate her information. (PSUF,
21 No. 53) Plaintiff argues that Yee knew that there were
22 inconsistencies in Monique Thomas' statement. However, Plaintiff
23 fails to establish how failure to corroborate witness testimony
24 makes such testimony false or establishes Yee's deliberate
25 falsehood.

26 In support of her arguments, Freeman disputes the fact that
27 Detective Yee received credible information from reliable
28 sources, including confidential informants, and continued to

1 monitor the information provided to him from those informants.
2 (DSUF, No. 4). Freeman also disputes that the twenty-four page
3 statement of probable cause in support of the Search Warrant
4 accurately described the one and a half year investigation
5 arising out of the gang related shootings in Fresno and other
6 criminal acts committed by members of the West Side Strother Boys
7 and Garrett Street gangs. (DSUF, No. 6)

8 Freeman argues that Detective Yee's affidavit lacked
9 adequate foundation for the reliability of any of the
10 confidential and/or anonymous sources. (PSDF, No. 1) Freeman
11 also argues that Detective Yee lacked personal corroboration
12 information regarding the confidential/anonymous sources which
13 had been deemed "reliable" by Officers other than Detective Yee.

14 Freeman offers no support in the form of affidavits,
15 exhibits, or any other information or evidence to show that Yee
16 did not receive credible information from reliable sources,
17 including confidential informants or that his declaration was not
18 made in good faith. Freeman disputes the accuracy of Yee's
19 affidavit by arguing that:

- 20 1. Yee did not ensure the reliability of several
21 confidential informants he used to gather his
information
- 22 2. Yee did not know or speak to several of the
23 confidential informants to determine the accuracy
of the information they provided
- 24 3. There is no way of telling the reliability of
25 these informants because that information is
contained in the sealed portion of the affidavits
- 26 4. Detective Yee did not take Monique Thomas'
27 complaint and knew that Detective Andreas and
28 Detective Torres were unable to corroborate her
information

1 Freeman further argues that, based on his investigation,
2 Detective Yee was not reasonable in concluding the following:

- 3 1. That the ten residences searched were in
4 possession of weapons and gang indicia that had
5 been used in the gang related shootings he was
6 investigating.
- 7 2. That surveillance conducted of Darryl Hilliard
8 determined an association between him and the ten
9 residences.
- 10 3. That there was a strong possibility that evidence
11 of gang membership, firearms and ammunition would
12 be found at these homes.
- 13 4. That the search warrant should be a "high risk"
14 warrant because it involved the search for
15 weapons, mostly firearms and gang indicia
- 16 5. That he had a good faith belief that there was
17 sufficient probable cause to justify the issuance
18 of the warrant, that the warrant was not
19 overbroad, that the warrant was lawful, and that
20 the informants used were reliable.

21 However, Freeman does not dispute that Yee knew that at the
22 time the warrant was sought, a long history of violence existed
23 between the Strother Boys and the Garret Street gangs and that
24 these incidents were described in Yee's affidavit. Plaintiff
25 admits that her residence is located in an area well known for
26 criminal street gang activity and violence where most of the
27 gang-related shootings in the southwest occur. Freeman also
28 admits that Hilliard's mother dropped off Hilliard at her
residence and drove away without him. Further, later that same
day, after a court appearance at the Fresno County Courthouse,
Hilliard was observed getting into Freeman's automobile. While
Freeman disputes that her granddaughter, Shatera Dillingham lived
with her for a significant period of time and that Shatera was
still Hilliard's girlfriend at this point. Plaintiff does not

1 dispute that Dillingham drove Hilliard to his mother's house at
2 high speeds making quick turning movements as Hilliard leaned
3 down in the front passenger seat to conceal himself. Plaintiff
4 does not dispute that Hilliard was a suspected gang member.

5 Further, on February 2, 2004, after attending court Hilliard
6 was observed driving Freeman's vehicle to various locations,
7 where he made contact with several Strother Boy gang affiliates.
8 Freeman admits that Hilliard's behavior while driving her car was
9 consistent with that counter-surveillance activities of a person
10 involved in dealing drugs. Further Freeman also does not dispute
11 that it is common practice for gang members to keep their
12 weaponry, stolen property, and other evidence of their crime
13 involvement at their homes or "safe houses." Freeman does not
14 dispute that a gang member will attempt to evade detection by the
15 police by moving their property among associates, members, and
16 girlfriends within their own gang.

17 Viewing the facts in dispute in Freeman's favor, the
18 undisputed facts do not show that Yee's affidavit was based on
19 deliberate falsehood or reckless disregard, because Yee had
20 extensive knowledge of local West Fresno gang members and that
21 his conclusions came as the result of a one and a half year
22 investigation into gang violence between Strother Boys and Garret
23 Street Gangs. The undisputed facts also show and Plaintiff
24 cannot credibly deny that Hilliard is a violent gang member of
25 the West Side Strother Boys; Hilliard had numerous contacts with
26 Freeman's granddaughter Shatera, rode in Freeman's car; and was
27 in Freeman's residence on more than one occasion prior to the
28 search. Further, Freeman's objection to Yee's reliance on

1 confidential informants and witnesses in no way establishes that
2 Yee's affidavit was based on falsehood and misrepresentation to
3 the court.

4 (b) Even if Freeman's Disputes As to the
5 Confidential Informants and Witnesses Are
6 Sufficient to Show Misrepresentations in the
7 Affidavit, Such Misrepresentations Are Not So
8 Material That the Warrant Would Not Have Been
9 Issued

10 Even assuming arguendo the alleged failings in portions of
11 Yee's declaration, it cannot be said that the search warrant
12 would not have been issued but for the alleged misrepresentations
13 by Yee obtained from reliance on confidential informants and
14 witnesses. Freeman does not dispute that Yee observed Hilliard,
15 a violent Strother Boy gang member was present in Plaintiff's,
16 Hilliard's, house, drove around in her car; and had a
17 relationship with Plaintiff's granddaughter. Where a law
18 enforcement officer's observations support a reasonable belief
19 that a parolee resides at a particular address, this provides a
20 reasonable basis for a parole search. *Motley v. Parks*, 432 F.3d
21 1072, 1078 (9th Cir. 2005.) The undisputed facts show that
22 Detective Yee's year and a half long investigation of the
23 Strother Boys and Garret Street gang and Hilliard's involvement
24 as described, was fully sufficient to establish the requisite
25 probable cause for a search warrant.

26 Plaintiff cannot deny Hilliard was a violent gang member and
27 convicted felon. On the basis of all the evidence known to Yee,
28 he had a duty to seek a search warrant to lawfully endeavor to

1 locate the suspected weapon used in a gang shooting. Summary
2 judgment in favor of Defendant Yee is GRANTED.

3 ii. Defendant Officers' Reliance on the Search Warrant

4 To establish a Fourth Amendment violation by Defendants
5 Garrison, Capriola, Barrimond, Hollins, Perez, and Simons Freeman
6 must show they (1) unreasonably relied on the search warrant to
7 conduct the search of her residence and, if so, (2) that no
8 reasonable officer, confronting the same circumstances and with
9 the same information, would have executed the warrant and made
10 their entry into Freeman's home the same way. See *Saucier*, 533
11 U.S. at 202.

12 (a) Defendant Officers Were Not Unreasonable In
13 Relying on a Valid Search Warrant to Conduct
14 Their Search of Freeman's Home

15 A warrant must name the places to be searched and the items
16 to be seized with reasonable precision. *United States v. Mann*,
17 389 F.3d 869, 877 (9th Cir. 2004). While a search warrant must
18 describe items to be seized with particularity sufficient to
19 prevent a general, exploratory rummaging in a person's
20 belongings, it need only be reasonably specific rather than
21 elaborately detailed. *Id.*

22 It is undisputed that the ten residences were listed and
23 described with particularity in Attachment "A" to the Search
24 Warrant Affidavit. (DSUF, No. 58) The items to be seized
25 included evidence of gang membership, firearms and ammunition,
26 and were specifically listed in Attachment "B" to the Search
27 Warrant Affidavit. (DSUF, No. 59) Detective Yee had probable
28 cause to believe, and did believe, that the property described in

1 Attachment "B" to the Affidavit was lawfully seizable pursuant to
2 California Penal Code Section 1524. (DSUF, No. 60)

3 It is also undisputed that on or about February 17, 2004,
4 Detective Yee took the Search Warrant Affidavit and Confidential
5 Attachment to the Honorable Judge Franklin P. Jones' chambers in
6 the Fresno County Superior Court. (DSUF, No. 63) Detective Yee
7 believed that Judge Jones was a detached and neutral magistrate
8 at the time he presented the Search Warrant Affidavit to him.
9 There is no evidence to the contrary. (DSUF, No. 64) Freeman
10 does not dispute that Judge Jones signed the Search Warrant after
11 thorough review on February 17, 2004 and authorized the search of
12 the ten residences. (DSUF, No. 69) Judge Jones ordered the
13 confidential portion of the Affidavit to be sealed, which was
14 kept in the custody of the Fresno County Superior Court. (DSUF,
15 No. 70) All the officers who participated in the service of this
16 Search Warrant understood that this was a "high risk" warrant due
17 to the nature of the underlying crimes being committed by the
18 suspect Darryl Hilliard that included homicide, gang-related
19 shootings, and other criminal activity. Freeman also does not
20 dispute that the officers also understood they were searching for
21 firearms, ammunition, gang indicia and other evidence of criminal
22 activity. (DSUF, No. 223) Plaintiff had the right to obtain the
23 confidential portion of the search warrant affidavit in discovery
24 in this case and apparently failed to do so.

25 The search warrant in this case was not overbroad or
26 insufficiently particular. Officers in this case reasonably
27 relied on a search warrant issued by a detached and neutral
28 magistrate.

(b) A Reasonable Officer Confronting the Same
Circumstances and With the Same Information
Would Have Executed the Search Warrant In the
Same Manner

While Freeman does not bring an excessive force claim, she argues that police conduct was unreasonable in executing the warrant upon entry into her home when she was knocked on the floor.

(1) Undisputed Facts Regarding Officers'
Briefing

It is undisputed that On the morning of February 19, 2004, all officers who were to participate in serving the Search Warrant, met at the M.A.G.E.C. headquarters for a briefing before the search. (DSUF, No. 114) Members of this team consisted primarily of Fresno County Sheriff Deputies, who included: Defendants Ian Barrimond, John Capriola, Jason Hollins, Robert Perez, and Andrew Simonson; as well as Fresno Police Officer Robert Garrison. During the briefing, Detective Yee provided all the officers with the following:

1. a background of his investigations
2. a history of the ongoing gang-related shootings
3. the nature of the Search Warrant and information regarding suspect Darryl Hilliard
4. a photograph of Darryl Hilliard
5. the locations to be searched
6. copies of the list of items authorized to be searched for and seized
7. and a copy of the Notice of Search Warrant that each team was to serve on the occupants of the residences

1 Detective Yee cautioned the officers that they were serving
2 a "high risk" Search Warrant and to expect for Darryl Hilliard or
3 his fellow gang members and/or associates, to be at any of the
4 locations. He also cautioned that it was very likely that such
5 individuals would be armed.

6 (2) Search of Freeman's Residence

7 It is also undisputed that all the officers who participated
8 in the service of the Search Warrant understood that it was
9 "high risk" due to the nature of the underlying crimes being
10 committed by the suspect Darryl Hilliard. These crimes included
11 homicide, gang related shootings, and other criminal activity.
12 All the officers understood that Hilliard was a validated gang
13 member whose fellow gang members and associates were very
14 dangerous. Freeman does not dispute that the officers also
15 understood they were searching for firearms, ammunition, gang
16 indicia and other evidence of criminal activity.

17 It is undisputed that Plaintiff's front door is on a two
18 step elevation from the ground. The house has barred windows on
19 each side of the front door. (DSUF, No. 128) Officer Garrison
20 did not stand in front of the door but positioned himself
21 directly under the right front window on the ground level.

22 (DSUF, No. 130) Officer Garrison had his department issued
23 handgun in his right hand, and used his left hand to bang on the
24 security door. (DSUF, No. 131) He checked and confirmed the
25 security door was locked. (DSUF, No. 133)

26 Plaintiff, who was inside the residence, did not immediately
27 open the door and the Officers on the stick were growing
28

1 concerned that the team was taking too long to make entry. After
2 a lengthy period of time, the interior door finally opened.

3 (DSUF, No. 134) Plaintiff, responded, "what do you want?"

4 (DSUF, No. 136) Officer Garrison continued to tell Plaintiff to
5 open the door. (DSUF, No. 137) Plaintiff finally unlocked the
6 security door at which point Officer Garrison grabbed the door
7 handle and pulled the door open. (DSUF, No. 138) Officer

8 Garrison stepped onto the front step and made entry into the
9 home, he was telling Plaintiff to get down on the floor. (DSUF,

10 No. 139) Plaintiff was verbally abusive to Officer Garrison as
11 well as the Paramedics who arrived on scene. (DSUF, No. 243)

12 There was no cover or concealment for any of the officers who
13 were in that doorway. (DSUF, No. 146) The doorway is known as
14 the "funnel of death". This is due to the high likelihood of

15 officers being injured or killed in the doorway because of the
16 backlighting. Therefore it is necessary to get through the

17 doorway as quickly and safely as possible. This ensures the
18 safety of the officers and the subjects of the residence. (DSUF,
19 No. 148)

20 However, Freeman disputes the following facts related to the
21 entry to her residence:

- 22 1. The officers were unable to see through the locked
23 security door and could not tell whether or not
the interior door was opened. (DSUF, No. 129)
- 24 2. Officer Garrison knocked loudly on the door and
25 shouted words similar to, "Police Department,
26 Search Warrant, Open the door!" several times.
(DSUF, No. 132)
- 27 3. Again, Officer Garrison shouted, "Police
28 Department, Search Warrant, Open the door!"
(DSUF, No. 135)

- 1 4. Defendants served the Search Warrant lawfully,
2 professionally and ethically. (DSUF, No. 158)
- 3 5. All the officers understood that Darryl Hilliard
4 or any of his fellow gang members or affiliates
5 could be at Plaintiff's residence and possibly
6 armed. (DSUF, No. 224)
- 7 6. Given the totality of the available information,
8 including two independent civilian witnesses,
9 Defendants' Police Practices Expert, Joseph
10 Callanan agrees that these officers complied with
11 standard police procedures in their approach to
12 the Plaintiff's residence and in their verbal
13 announcements attempting to identify themselves,
14 establish the reason for their presences, and
15 demand entry. From a law enforcement perspective,
16 the described police procedures fully comport with
17 professional training based on both federal and
18 state guidelines. (DSUF, No. 227)

11 These disputes raise the issue whether the search warrant
12 was lawfully executed and whether Defendants' handling of
13 Plaintiff effected an unlawful seizure under the Fourth
14 Amendment.

15 (3) Sergeant Barrimond

16 It is undisputed that prior to embarking to the Plaintiff's
17 residence, Sergeant Barrimond obtained, reviewed and familiarized
18 himself with a copy of the entire Search Warrant Affidavit and
19 attachments because he wanted to be comfortable with it since his
20 team did not write the Search Warrant. (DSUF, No. 190)

21 When the team arrived at Plaintiff's residence, Sergeant
22 Barrimond got in position about the fourth or fifth officer in
23 the entry "stick." (DSUF, No. 191) Officer Garrison continued
24 to knock, but no one from within the residence opened the door.
25 (DSUF, No. 193) The team waited a reasonable period of time
26 before receiving a response from within the residence, that
27 Sergeant Barrimond almost ordered the team to force entry by
28 using the breaching device. (DSUF, No. 194)

1 During the knocking Barrimond heard a voice from within the
2 home. Finally the occupant of the home unlocked the door at
3 which point Sergeant Barrimond gave the command, "let's go".
4 (DSUF, No. 195) Sergeant Barrimond was concerned about the
5 officers being in the "funnel of death" because they did not know
6 whether there was anyone within the residence who had weapons.
7 (DSUF, No. 196) The officers had a disadvantage because the
8 sunlight was behind them, so they were backlit and the interior
9 of Plaintiff's residence was somewhat dark. (DSUF, No. 197)

10 After making entry, Sergeant Barrimond's eyes had to
11 acclimate to the dimness of the house. (DSUF, No. 198) After
12 the residence was secured, Sergeant Barrimond focused his
13 attention on Plaintiff who was leaning on a chair, and the
14 children who were on the couch in the living room. (DSUF, No.
15 199)

16 The facts raise a question whether Sergeant Barrimond was
17 reasonable in his execution of the search warrant. He gave the
18 command to enter based upon the belief that persons inside the
19 residence were not responding. Plaintiff declares that she
20 answered the door and there was no need for forced entry. The
21 facts show that once inside the residence, Sergeant Barrimond
22 helped Plaintiff get seated on a chair and explained to her why
23 the officers were there and the purpose of their search. He
24 advised her that the officers were looking for guns and gang-
25 related items pursuant to a search warrant. Further, in an
26 attempt to calm the children in the house, Sergeant Barrimond
27 then began talking to the children and tried to make funny faces
28 and small talk to make them comfortable. (DSUF, No. 202) He

1 asked Plaintiff if the kids needed to be changed, fed or taken
2 care of in any way. (DSUF, No. 203)

3 Plaintiff was not arrested or cited for any offense, nor was
4 she ever subjected to a pat down search, placed in handcuffs or
5 restrained in any other way. In fact, she was allowed to use the
6 telephone to receive and make phone calls. (DSUF, No. 206)

7 Sergeant Barrimond asked Plaintiff if she was okay and
8 whether or not she would like an ambulance called. (DSUF, No.
9 195) Plaintiff complained of hip pain but refused the offer to
10 have an ambulance called. (DSUF, No. 207) Nevertheless, Sergeant
11 Barrimond directed Officer Garrison to call an ambulance because
12 he wanted to make sure Plaintiff was okay. When the paramedics
13 arrived, Plaintiff refused treatment. (DSUF, No. 208)

14 Freeman however argues that Barrimond entered the house
15 yelling at people to get on the ground and that he in fact did
16 see Freeman upon first entry, contrary to what he claims.

17 If a trier of fact believes Plaintiff's version of the
18 events, there was no need for forced entry to execute the search
19 warrant.

20 Summary Judgment in favor of Sergeant Barrimond is DENIED.

21 (4) Officer Garrison

22 Freeman does not dispute that Officer Garrison immediately
23 entered the residence but was not able to clearly see inside due
24 to a brief eye adjustment caused by coming in from outside where
25 it was bright and sunny, into a small, dimly lit room. It is
26 further undisputed that given the amount of time between Officer
27 Garrison entering the residence, feeling a perceived threat to
28 his gun arm, combined with his inability to see clearly, and his

1 men directly behind him moving quickly, he did not have
2 sufficient time to evaluate the age and characteristics of this
3 individual. Ordinarily, a search warrant entry should be very
4 rapid, and although the momentum of the officers on this team was
5 originally quick, the entry was much slower due Officer
6 Garrison's encounter with Plaintiff.

7 After the home was secured, Officer Garrison returned to the
8 living room area, which was the first time he realized Plaintiff
9 was an elderly female. Officer Garrison inquired as to whether
10 Plaintiff was okay and offered to call her an ambulance, but she
11 refused. He asked her for her name, but she was uncooperative
12 and verbally abusive towards him. Plaintiff does not dispute
13 these facts. Officer Garrison did not want to aggravate the
14 tension Plaintiff was already exhibiting, so, he limited his
15 contact with her. (DSUF, No. 156) Officer Garrison as well as
16 all the officers on this team deny that Officer Garrison ever
17 threatened to shoot Plaintiff. (DSUF, No. 216)

18 However, there is a factual dispute as to whether Garrison
19 felt someone grab his right arm which was holding his gun.
20 Plaintiff says she did not. There is also dispute as to whether
21 Garrison pushed plaintiff away from him and whether she continued
22 to grab his arm, thereby causing the two to lose balance and
23 entangle their feet. Lastly, there is a factual dispute as to
24 whether Garrison yelled at Freeman to "Get down on the ground, or
25 I'll shoot you!" The facts raise a dispute as to whether a
26 reasonable officer confronting the same circumstances as
27 Garrison, with the same information under the totality of
28 circumstances, would have made forced entry into Freeman's home

1 in the same manner. Whether Freeman's Fourth Amendment rights to
2 be free of an unreasonable search and seizure and injured as a
3 result, remain in dispute.

4 Summary Judgment in favor of Officer Garrison is DENIED.

5 (5) Deputy Capriola

6 It is undisputed that Deputy Capriola was the third officer
7 who entered Plaintiff's residence, behind Officer Higgins, who
8 was behind Officer Garrison. Once inside the door, Deputy
9 Capriola observed Plaintiff laying partially on the ground and
10 halfway on a chair that was situated a foot or two on the right,
11 inside the door. (DSUF, No. 175) Plaintiff's legs were sticking
12 out partially in the doorway but Deputy Capriola did not see how
13 it was she landed in that position. (DSUF, No. 176) Deputy
14 Capriola stepped over Plaintiff's feet and went left into the
15 kitchen to secure that area. (DSUF, No. 177) After the house
16 was determined to be secured, he walked over to the Plaintiff and
17 assisted Sergeant Barrimond in helping Plaintiff to a couch.
18 (DSUF, No. 178) Deputy Capriola had no further contact or
19 communication with Plaintiff. (DSUF, No. 179)

20 Plaintiff fails to offer any evidence that Deputy Capriola's
21 entry and conduct was unreasonable or that he acted unlawfully in
22 any way, because he had no command responsibility, made no
23 independent decision to force entry, and did not use force of any
24 kind against anyone.

25 Summary judgment in favor of Deputy Capriola is GRANTED.

26 (6) Deputy Simpson

27 Plaintiff does not dispute that Deputy Simonson remained
28 outside of the residence securing the perimeter until the entry

1 team was done securing the interior of the residence. (DSUF, No.
2 163) Deputy Simonson then went inside the residence to assist in
3 documenting evidence seized on an inventory log. (DSUF, No. 164)
4 At no time while inside the residence did Deputy Simonson ever
5 make any physical or verbal contact with the Plaintiff. (DSUF,
6 No. 165) He was not present during the initial entry and did not
7 observe the physical contact between Plaintiff and Officer
8 Garrison. (DSUF, No. 166) Plaintiff fails to offer any evidence
9 that Deputy Simpson's conduct was unreasonable.

10 Summary judgment in favor of Deputy Simpson is GRANTED.

11 (7) Deputy Hollins

12 Deputy Hollins was one of the last officers to enter
13 Plaintiff's residence because he was assigned to the breaching
14 device that is used to force entry when necessary. (DSUF, No.
15 180) The breaching device requires two hands to carry so he did
16 not have a firearm in hand. (DSUF, No. 181) After securing the
17 residence but prior to conducting the search, Deputy Hollins
18 photographed the residence. He also photographed the items and
19 locations from where they were seized. (DSUF, No. 186) He had
20 no physical or verbal contact with the Plaintiff the entire
21 duration of the search. (DSUF, No. 187). Plaintiff fails to
22 offer any factual dispute as to any unlawful conduct by Deputy
23 Hollins.

24 Summary Judgment in favor of Deputy Hollins is GRANTED.

25 B. Freeman's Monell claim against the City of Fresno

26 To prevail on a § 1983 complaint against a local government
27 under *Monell*, a plaintiff must satisfy a three-part test: (1)
28 The official(s) must have violated the plaintiff's constitutional

rights;¹ (2) The violation must be a part of policy or custom and may not be an isolated incident; and (3) A nexus must link the specific policy or custom to the plaintiff's injury. See *Monell*, 436 U.S. at 690-92. There are three ways to show a policy or custom of a municipality:

- (1) By showing a longstanding practice or custom which constitutes the standard operating procedure of the local government entity;
- (2) By showing that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision or
- (3) By showing that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate.

Menotti v. City of Seattle, 409 F.3d 1113, 1147 (9th Cir. 2005). A municipal policy may be inferred from widespread practices or evidence of repeated constitutional violations for which the errant municipal officers were not discharged or reprimanded. *Id.*

Plaintiff argues that Defendants' alleged constitutional violations were according to official or tacitly approved policy, practice and custom of the City of Fresno. Plaintiff further

¹ "[A] public official is liable under § 1983 only if he causes the plaintiff to be subjected to deprivation of his constitutional rights." *Brass*, 328 F.3d at 1200 (quoting *Baker v. McCollan*, 443 U.S. 137, 142 (1979) (citation and internal quotation marks omitted)). "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Brass*, 328 F.3d at 1200 (quoting *Baker*, 443 U.S. at 146).

1 argues that Defendants City of Fresno negligently hired, trained,
2 staffed, and supervised Defendant officers by failing to
3 adequately and properly supervise, control, and discipline them
4 for violating her Fourth Amendment rights. However, Plaintiff
5 has not introduced evidence creating a material issue of fact as
6 to whether the Defendant officers were acting pursuant to a
7 municipal policy or custom. Plaintiff disputes a number of facts
8 regarding the training requirements that the Police Department
9 requires its officers to undergo. Freeman disputes the following
10 facts:

- 11 1. Officers employed with the Fresno Police
12 Department are given training over and above that
13 required by POST, (Peace Officer Standards and
14 Training) the commission which regulates training
15 for law enforcement officers in California.
16 (DSUF, No. 229)
- 17 2. The Fresno Police Department had training units
18 that ensured that the officers employed by the
19 Department received training in compliance with
20 POST. (DSUF, No. 230)
- 21 3. The training provided to officers employed by the
22 Department meets or exceeds POST guidelines.
23 (DSUF, No. 231)
- 24 4. Prior to February 19, 2004, the Fresno Police
25 Department provided training to all their officers
26 including those assigned to the M.A.G.E.C. Unit
27 receive training on topics, including but not
28 limited to: (1) the appropriate means and manner
of conducting a search and seizure, in light of
the totality of the circumstances faced by the
officers; (2) proper use of force; (3) proper
investigation and acquisition of search warrants.
(DSUF, No. 232)
5. New police officer recruits are required go
through a field training program and are required
to complete 24 hours of POST training every 24
months. They also undergo a rigorous sixteen week
training program which includes training on the
appropriate use of force, including lethal force.
(DSUF, No. 233)
6. Officers are also provided training in the use of
force, including lectures and scenario-based
performances. The Fresno Police Department's
policy regarding the use of force is part of the
instruction given in any class in which the use of

- 1 force is reviewed. (DSUF, No. 234)
- 2 7. Plaintiff's retained police procedural matters
- 3 expert, Roger Clark, has expressed his opinion in
- 4 this case, the training provided by Fresno Police
- 5 Department to its police officers is consistent
- 6 with POST mandates. (DSUF, No. 235)
- 7 8. At all times relevant to this lawsuit, it has been
- 8 the policy of the Fresno Police Department to
- 9 conduct thorough internal investigations into
- 10 allegations of misconduct by employees of the
- 11 Department. (DSUF, No. 238)
- 12 9. It has also been the policy of the Fresno Police
- 13 Department to take sufficient corrective action to
- 14 prevent their employees from committing
- 15 constitutional violations, or any violations of
- 16 state or federal law. (DSUF, No. 239)
- 17 10. At no time relevant to this lawsuit has the Fresno
- 18 Police Department had any policies, practices or
- 19 customs of the following: (1) tolerating the use
- 20 of excessive or unjustified force; (2) allowing
- 21 constitutional violations by encouraging unlawful
- 22 police activity, withholding or concealing
- 23 material information from a search warrant; (3)
- 24 performing pretextual investigations that
- 25 vindicate and ratify an officer's misconduct; (4)
- 26 taking insufficient corrective actions to prevent
- 27 alleged patterns of constitutional violations from
- 28 continuing; (5) delegation of obligations to
- manage, supervise, train and control officers;
- and/or (6) avoiding proper public oversight of the
- actions of officers. (DSUF, No. 240)
11. The hiring process for new recruits with the
- Fresno Police Department includes, among other
- matters, obtaining a background check and a
- psychological evaluation of the applicant prior to
- hiring. The applicant's propensity toward
- untruthfulness is tested and used as a basis of
- exclusion of potential applicants. (DSUF, No.
- 241)
12. New recruits are required to undergo a rigorous
- sixteen week training program which includes
- training on the appropriate use of force. (DSUF,
- No. 242)

Plaintiff does not offer evidence to create factual disputes in

this case to sustain Freeman's Fourth Amendment claim. Freeman

merely denies that there was no policy or custom in place

tolerating the use of excessive force. Freeman has not

1 established by any evidence that any conduct against her person
2 by any officer resulted from any *Monell* policy or pattern and
3 practice. To the contrary, Plaintiff's expert agreed that Fresno
4 City Police Officer training meets or exceeds P.O.S.T. standards.
5 Freeman has no evidence that any alleged of rights violation was
6 the product of a pattern, practice, or policy of the City of
7 Fresno. Plaintiff has submitted no affidavits or testimony that
8 establishes any disputed issues of fact that her alleged injuries
9 were the result of a longstanding practice or custom by the City
10 of Fresno to hire and keep "rogue cops" or failure to train its
11 officers.

12 Based on the totality of the record, and viewing the
13 evidence in the light most favorable to Plaintiff, there are no
14 material issues concerning the adequacy of training, hiring, and
15 supervisory measures of the City of Fresno in the administration
16 of its Police department. Nor is there evidence that the City is
17 responsible for the training and supervision of M.A.G.E.C. or
18 that any M.A.G.E.C. practice or tactic violates the law or any
19 P.O.S.T. standard.

20 Defendants' motion for summary judgment as to Freeman's
21 *Monell* claim against the City of Fresno is GRANTED.

22 C. State Law Claims Against Garrison, Yee, and City of Fresno

23 1. Supplemental Jurisdiction Under 1367(a)

24 Title 28 U.S.C. section 1367(a) provides in pertinent part:
25 "In any civil action of which the district courts have original
26 jurisdiction, the district court shall have supplemental
27 jurisdiction over all other claims that are so related to the
28 claims in the action within such original jurisdiction that they

1 form part of the same case or controversy under Article III of
2 the United States Constitution."

3 Freeman alleges a § 1983 claim for Fourth Amendment
4 violations. Freeman's state law claims invoke supplemental
5 jurisdiction and arise from the same facts in controversy in her
6 §1983 claim.

7 2. California Tort Claims Act

8 In California, a person making a claim against a public
9 entity or a public employee must present such a claim in writing
10 to the clerk, auditor or secretary of the local public entity
11 within six months after the accrual of the cause of action. Cal.
12 Gov. Code § 911.2.; see also *Javor v. Taggart*, 98 Cal. App. 4th
13 795, 804 (Cal. Ct. App. 2002) (submission of a claim to a public
14 entity pursuant to the California Tort Claims Act is a condition
15 precedent to a civil action against the state or its employees
16 and failure to present the claim bars the action.) A person may
17 not maintain a cause of action against a public entity or public
18 employee without having first presented a claim as required by
19 California Statute. Cal. Gov. Code 945.4. Cal. Gov. Code
20 section 954.6 requires that a claimant file a civil action within
21 six months after the public agency issues its decision. *Javor*,
22 98 Cal. App. 4th at 804. Defendants concede that Plaintiff's
23 claim was timely filed.

24 3. California Civil Code § 43 claims

25 California Civil Code § 43 states in relevant part, "Besides
26 the personal rights mentioned or recognized in the Government
27 Code, every person has, subject to the qualifications and
28 restrictions provided by law, the right of protection from bodily

1 restraint or harm from personal insult, from defamation, and from
2 injury to his personal relations."

3 There are no issues of disputed fact showing that Freeman
4 was subjected to bodily restraint, harm from personal insult,
5 defamation, or injury to her personal relations.

6 Summary Judgment is GRANTED in favor of Defendants on
7 Plaintiff's Civil Code § 43 claims.

8 4. California Civil Code § 52.1

9 Cal. Civ. Code § 52 sets forth a damages remedy for civil
10 rights violations under California Law. *Koebke v. Bernardo*
11 *Heights Country Club*, 36 Cal. 4th 824, 836 (Cal. 2004). Civ.
12 Code § 52.1(a) provides that if a person interferes, or attempts
13 to interfere, by threats, intimidation, or coercion, with the
14 exercise or enjoyment of the constitutional or statutory rights
15 of an individual or individuals, a civil action may be brought
16 for equitable or injunctive relief. *Venegas v. County of Los*
17 *Angeles*, 32 Cal. 4th 820, 841 (Cal. 2004). Cal. Civ. Code §
18 52.1(b) allows any individual so interfered with to sue for
19 damages. *Id.* Cal. Civ. Code § 52.1(g) states that an action
20 brought under § 52.1 is independent of any other action, remedy
21 or procedure that may be available to an aggrieved individual
22 under any other provision of law. *Id.* To state a claim under
23 California Civil Code § 52.1, Plaintiffs must allege that the
24 interference with the plaintiff's rights by means of threats,
25 intimidation, or coercion was "because of" their membership in a
26 protected classification. *Nelson v. City of Irvine*, 143 F.3d
27 1196, 1206 (9th Cir. 1998).

28 Here, although Plaintiff is African-American, she does not

1 allege that Defendants interfered with her legal rights due to
2 her particular membership in a protected class.

3 Summary judgment is GRANTED in favor of Defendants on
4 Plaintiff's California Civil Code § 52.1 claim.

5 5. California Civil Code § 51.7

6 California Civil Code § 51.7(a) states:

7 "All persons within the jurisdiction of this state have the right
8 to be free from any violence, or intimidation by threat of
9 violence, committed against their persons or property because of
10 political affiliation, or on account of any characteristic listed
11 or defined in subdivision (b)¹ or (e)² of Section 51, or position
12 in a labor dispute, or because another person perceives them to
13 have one or more of those characteristics."

14 California Civil Code § 51.7 is a separate and independent
15 enactment referred to in § 52.1. California Civil Code § 52.1(b)
16 makes persons who violate § 51.7 liable for actual and exemplary
17 damages.

18 Plaintiff does not bring claims against Defendants on a
19 theory that she suffered a constitutional deprivation because she
20 is a member of a protected class.

21
22 ¹ Cal. Civ. Code § 51(b) provides, "All persons within the
23 jurisdiction of this state are free and equal no matter what
24 their sex, race, color, religion, ancestry, national origin,
25 disability, medical condition, marital status, or sexual
26 orientation are entitled to the full and equal accommodations,
advantages, facilities, privileges, or services in all business
establishments of every kind whatsoever."

27 ² Cal. Civ. Code § 51(e) provides definitions for the terms
28 "Disability," "Medical condition," "Religion," "Sex," and "Sexual
Orientation."

1 Summary Judgment is GRANTED in favor of Defendants on
2 Plaintiff's California Civil Code § 51.7 claim.

3 6. Assault and Battery

4 To establish civil assault, plaintiff would need to
5 establish that (1) the officers threatened to touch her in a
6 harmful or offensive manner (2) it reasonably appeared to her
7 that they were about to carry out the threat (3) she did not
8 consent to the conduct (4) she was harmed and (5) the officers'
9 conduct was a substantial factor in causing the harm. CAL. PEN.
10 CODE § 240; *Tekle v. United States*, 457 F.3d 1088, 33 (9th Cir.
11 2006)

12 A civil battery claim requires that plaintiff show 1)
13 defendant intentionally did an act which resulted in a harmful or
14 offensive contact with the plaintiff's person, 2) plaintiff did
15 not consent to the contact, and 3) the harmful or offensive
16 contact caused injury, damage, loss or harm to the plaintiff.
17 CAL PENAL CODE § 242; *Tekle* 457 F.3d at 33; *Piedra v. Dugan*, 123
18 Cal. App. 4th 1483, 1495 (Cal. Ct. App. 2004) (internal quotations
19 omitted). A battery is any intentional, unlawful, and harmful
20 contact by one person with the person of another. *Id.* A harmful
21 contact, intentionally done is the essence of a battery. *Id.* A
22 contact is unlawful if it is unconsented to. *Id.*

23 The court in *Tekle* found that Plaintiff in that case raised
24 genuine issues of material facts regarding officers' engaging in
25 assault and battery. *Tekle* 457 F.3d at 35. According to
26 Plaintiff's deposition in that case, an officer handcuffed
27 plaintiff while he was lying face down on the ground, then picked
28 him up by the chain of the handcuffs cutting his skin. *Id.* The

1 court noted that over twenty armed officers encountered a
2 barefoot, unarmed eleven year old Plaintiff who was not resisting
3 them. *Id.* Further, Plaintiff testified that the officers
4 continued to keep their guns trained upon him throughout the
5 incident and that one officer picked him up from behind by the
6 chain of the handcuffs. *Id.*

7 Freeman's allegations, if believed, are that she offered no
8 resistance and there was no need to push her to the floor.

9 This requires that summary judgment be DENIED on Plaintiff's
10 state assault and battery claim.

11 7. False Imprisonment

12 The basis for the tort of false imprisonment is the unlawful
13 restraint of another's liberty. *Arpin v. Santa Clara Valley*
14 *Transp. Agency*, 261 F.3d 912, 920 (9th Cir. 2001.)

15 There are no facts to show that Plaintiff was restrained,
16 arrested, or confined in any way during the officers' execution
17 of the warrant. While Plaintiff was unfortunately knocked over
18 during the execution of the warrant, the undisputed facts show
19 that, upon securing the perimeter, the officers assisted her onto
20 the couch and even allowed her to use the phone. She was not
21 handcuffed or restrained in any way. During the execution of a
22 search warrant, officers may keep persons on the premises in view
23 and from interfering with the search. Plaintiff offered no
24 evidence she was unreasonably detained.

25 Summary Judgment is GRANTED in favor of Defendants as to
26 Plaintiff's false imprisonment claim.

27 8. Trespass to Land

28 Trespass is an unlawful interference with possession of

1 property. *Saples v. Hoefke*, 189 Cal. App. 3d 1397, 1406 (1987).
2 A police officer executing a valid search warrant may enter a
3 plaintiff's home. *Brunette v. Humane Soc'y*, 294 F.3d 1205, 1210
4 (9th Cir. XXX) Despite this privilege to enter, the police
5 officer's actions while executing the warrant must relate to the
6 objectives of the authorized intrusion. *Id.*

7 The officers in this case entered Freeman's home pursuant to
8 a valid search warrant. It is undisputed that Freeman's home was
9 listed and described with particularity in Attachment "A" to the
10 Search Warrant Affidavit. (DSUF, No. 58) The items to be seized
11 were also detailed in the warrant. These items included evidence
12 of gang membership, firearms and ammunition, and were listed in
13 Attachment "B" to the Search Warrant Affidavit. (DSUF, No. 59)

14 Summary judgment as to Plaintiffs claim for trespass is
15 GRANTED in favor of Defendants.

16 9. Intentional Infliction of Emotional Distress

17 Freeman asserts intentional infliction of emotional distress
18 against Defendant Officers.

19 To state a claim for intentional infliction of emotional
20 distress, a plaintiff must allege 1) extreme and outrageous
21 conduct by the defendant, with the intent or reckless disregard
22 of the probability of causing emotional distress 2) plaintiff
23 suffered severe emotional distress and 3) that defendant was the
24 cause of the emotional distress. *Ess v. Eskaton Properties,*
25 *Inc.*, 97 Cal. App. 4th 120, 129 (Cal. Ct. App. 2002). The
26 conduct must be extreme and outrageous, so as to be intolerable
27 in a civilized society. See, *Tekle v. United States*, 457 F.3d
28 1088, 1103 (9th Cir. 2006).

1 Freeman's state claim for intentional infliction of
2 emotional distress by the officers fails to show evidence of
3 extreme and outrageous conduct in executing the search warrant.
4 Emotional distress damages are provable as part of Plaintiff's
5 § 1983 claim. On the record presented, the officers' conduct was
6 not so extreme or outrageous to support a claim for intentional
7 infliction of emotional distress.

8 Summary Judgment in favor of Defendants is GRANTED.

9 10. Negligent Infliction of Emotional Distress

10 To prove a claim for negligent infliction of emotional
11 distress a plaintiff must show: 1) serious emotional distress, 2)
12 actually and proximately caused by 3) wrongful conduct 4) by a
13 defendant who should have foreseen that the conduct would cause
14 such distress. *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th Cir.
15 2004). It is well settled that negligent infliction of emotional
16 distress is not an independent tort; rather it is the tort of
17 negligence to which the duty element applies. *Marlene F. v.*
18 *Affiliated Psychiatric Med. Clinic, Inc.*, 48 Cal. 3d 583, 588
19 (Cal. 1989); *Friedman*, 107 Cal. App. 4th at 464;.

20 Where injury such as mental and emotional distress is caused
21 by the constitutional violation, that injury is compensable under
22 § 1983. *Anderson v. Cent. Point Sch. Dist.*, 746 F.2d 505, 508
23 (9th Cir. 1984); *Carey v. Phipps*, 435 U.S. 247, 263-264 (1978).
24 Freeman's emotional distress claims are properly alleged under
25 her §1983 claim. The circumstances of this case do not support a
26 claim for NIED. Freeman was not a target of the search, the
27 officers had no animus as to her, and did not intentionally act
28 to cause her harm.

1 Freeman does not dispute that she has stress. However,
2 according to the undisputed facts, this stress is the result of
3 her granddaughter living with her and does not result from the
4 officers' conduct.

5 Summary Judgment GRANTED in favor of Defendants on the
6 negligent infliction of emotional distress claim.

7 VI. CONCLUSION

- 8 • Summary Judgment as to Detective Yee is GRANTED.
- 9 • Summary judgment as to Sergeant Barrimond is DENIED.
- 10 • Summary Judgment as to Officer Garrison is DENIED.
- 11 • Summary Judgment as to Deputy Capriola is GRANTED in favor
12 of Defendants
- 13 • Summary Judgment as to Deputy Simpson is GRANTED in favor of
14 Defendants
- 15 • Summary Judgment as to Deputy Hollins is GRANTED in favor of
16 Defendants
- 17 • Summary Judgment as to the City of Fresno is GRANTED in
18 favor of Defendants
- 19 • Summary Judgment as to Plaintiffs claims under Cal. Civ.
20 Code §43 is GRANTED in favor of Defendants
- 21 • Summary Judgment as to Plaintiffs claims under Cal. Civ.
22 Code 52.1 is GRANTED in favor of Defendants
- 23 • Summary Judgment as to Plaintiffs claims under Cal. Civ.
24 Code 51.7 is GRANTED in favor of Defendants
- 25 • Summary Judgment as to Plaintiffs claims for assault and
26 battery is DENIED.
- 27 • Summary Judgment as to Plaintiffs claims for false
28 imprisonment is GRANTED in favor of Defendants

- 1 • Summary Judgment as to Plaintiffs claims for trespass to
2 land is GRANTED in favor of Defendants
- 3 • Summary Judgment as to Plaintiffs claims for intentional
4 infliction of emotional distress is GRANTED in favor of
5 Defendants
- 6 • Summary Judgment as to Plaintiffs claims for negligent
7 infliction of emotional distress is GRANTED in favor of
8 Defendants

9 IT IS SO ORDERED.

10 Dated: December 22, 2006
11 dd010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE